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J. N. Dar
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PATNA SECTION

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THE PATNA HIGH COURT
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PATNA HIGH COURT

1919

Chief Justice:

The Hon'ble Sir Frederick Dawson-Miller, Kt., K.C.

Puisne Judges :

The Hon'ble Mr. B. K. Mullick, I. C. S.

" " " F. R. Roe, I. C. S.

" " " C. Atkinson, K. C.

" " " Jwala Prasad.

" " " P. C. Manuk.

" " " P. R. Das.

" " " L. C. Adami (*Actg.*)

" " " H. Foster (*Actg.*)

" " " S. Sultan Ahmed (*Actg.*)

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TABLE No. I.

Showing seriatim the pages of PATNA LAW JOURNAL for the year 1919, with corresponding references of the ALL INDIA REPORTER.

N.B.—Column No. 1 denotes pages of 4 PATNA LAW JOURNAL.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

4 Patna Law Journal=All India Reporter.

PLJ	A. I. R.	PLJ	A. I. R.	PLJ	A. I. R.	PLJ	A. I. R.	PLJ	A. I. R.
1	1918 P 135	154	1919 P 210	301	1919 P 392	415	1919 P 305	542	1919 P 316
7	1919 " 98	159	" " 136	302	" " 13	420	" " 288	548	" " 120
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35	" " 69	191	1918 " 131	323	" " 233	456	1919 " 567	609	" " 350
37	" " 373	195	1922 " 359	325	" " 51	461	" " 383	636	1920 " 220
38	" " 91	198	1919 " 92	330	1918 " 67	463	" " 207	642	" " 567
49	1919 " 324	202	1918 " 71	336	" " 65	472	" " 9	645	" " 735
53	" " 312	205	1919 " 232	340	1919 " 501	475	" " 212	653	" " 708
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94	" " 425	277	1920 " 600	365	" " 95	511	" " 411	682	1919 " 561
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115	" " 1	289	1919 " 534	381	" " 503	523	" " 134	700	" " 593
135	" " 192	294	" " 375	387	" " 507	525	" " 330	703	" " 656
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N.B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

1919 Patna High Court Cases=All India Reporter

PHCC	A. I. R.	PHCC	A. I. R.	PHCC	A. I. R.	PHCC	A. I. R.	PHCC	A. I. R.
1	1918 P 103	137	1918 P 59	242	1919 P 159	298	1919 P 207	396	1919 P 268
32	" " 62	139	1919 " 92	245	" " 120	303	" " 127	399	1918 " 125
33	1919 " 27	141	1918 " 132	250	" " 362	305	" " 146	400	1919 " 51
46	1918 " 95	145	1919 " 343	255	1918 " 60	323	" " 56	404	1918 " 79
49	1919 " 1	147	" " 71	257	1919 " 305	325	" " 212	409	1919 " 345
60	" " 573	150	" " 42	260	" " 136	329	" " 350	416	1920 " 509
62	1918 " 142	155	1918 " 126	262	" " 534	343	" " 561	419	1919 " 386
65	1919 " 84	162	" " 1	265	" " 556	349	" " 286	426	1918 " 73
75	" " 192	209	1920 " 785	272	" " 134	352	1918 " 40	434	1920 " 354
79	" " 131	210	1919 " 102	273	" " 45	354	1919 " 297	439	1919 " 480
80	" " 188	218	1918 " 138	276	" " 9	365	" " 293	441	1918 " 54
81	" " 425	220	1919 " 330	278	" " 283	372	" " 312	449	1920 " 533
88	" " 13	226	" " 181	279	" " 195	373	1918 " 139	451	" " 678
92	" " 47	232	" " 58	282	1918 " 52	377	1919 " 260	461	" " 423
98	" " 22	235a	" " 578	284	1919 " 491	386	" " 574	463	" " 526
105	" " 430								
120	1918 " 61	235b	" " 108	286	" " 547	390	" " 365	465	1919 " 454
121	" " 41	241	" " 486	289	" " 165	393	" " 196	479	192

20 Cr. L. J. & 49 to 53 Indian Cases=All India Reporter.

Please refer to COMPARATIVE TABLE No. II in A. I. R. 1919 Lahore.

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1919 PATNA, with corresponding references of other REPORTS, JOURNALS and PERIODICALS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1919 PATNA.

Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1919 Patna=Other Journals.

A.I.R. Other Journals				A.I.R. Other Journals				A.I.R. Other Journals				A.I.R. Other Journals			
1	49	IC	785	91	20	Cr L J	452	173	49	IC	773	266	20	Cr L J	245
FB	1919	PHCC	49	92	50	IC	511		20	Cr L J	213	268	52	IC	996
	4	PLJ	115		4	PLJ	198	174	49	IC	769		1919	PHCC	396
9	51	IC	756		1919	PHCC	139		20	Cr L J	209	270	49	IC	442
FB	1919	PHCC	276	93	50	IC	52	176	49	IC	767		4	PLJ	57
	4	PLJ	472		4	PLJ	265	177	51	IC	949	276	52	IC	998
10	49	IC	627	99	4	PLJ	166	181	50	IC	463	279	52	IC	599
13 (1)	50	IC	298		1921	PHCC	42		1919	PHCC	226		4	PLJ	423
	4	PLJ	302		50	IC	315	185	49	IC	752		20	Cr L J	679
13 (2)	49	IC	504	102	50	IC	59	188	50	IC	444	281	51	IC	444
	1919	PHCC	88		1919	PHCC	210		1919	PHCC	80		4	PLJ	207
17	51	IC	774	108	50	IC	8	189	49	IC	650	283	52	IC	681
	20	Cr L J	534		1919	PHCC	235		20	Cr L J	202		1919	PHCC	278
22	49	IC	642	111	50	IC	337	192	49	IC	617	284	52	IC	692
	20	Cr L J	194		20	Cr L J	289	FB	1919	PHCC	75	286	53	IC	803
	1919	PHCC	98	120	50	IC	872		4	PLJ	135		4	PLJ	575
26	50	IC	30		1919	PHCC	245	195	51	IC	328		1918	PHCC	349
	20	Cr L J	270		4	PLJ	548		1919	PHCC	279	288	52	IC	31
27	49	IC	481	124	49	IC	832	196	51	IC	981		4	PLJ	420
FB	1919	PHCC	33	127	51	IC	359		1919	PHCC	393	290 (1)	51	IC	268
	4	PLJ	74		4	PLJ	360	199	51	IC	996		20	Cr L J	444
	20	Cr L J	161		1919	PHCC	303	202	50	IC	515	290 (2)	52	IC	764
36	50	IC	323	128	50	IC	33		4	PLJ	411	291	49	IC	439
	4	PLJ	152	129	50	IC	40	203	49	IC	919	293	51	IC	496
37	51	IC	352	130	49	IC	775		20	Cr L J	247		1919	PHCC	365
	20	Cr L J	464		20	Cr L J	215	207	51	IC	801		4	PLJ	565
38	49	IC	1000	131	50	IC	448		1919	PHCC	298	297	52	IC	711
42	49	IC	498		1919	PHCC	79		4	PLJ	463		1919	PHCC	354
	1919	PHCC	150	132	49	IC	858	210	49	IC	647		4	PLJ	716
45	59	IC	322		20	Cr L J	234		20	Cr L J	199	305 (1)	51	IC	471
SB	1919	PHCC	273	134 (1)	50	IC	544		4	PLJ	154		20	Cr L J	487
	22	Cr L J	66		1919	PHCC	272	212	51	IC	769	305 (2)	52	IC	723
47	50	IC	472		4	PLJ	523		20	Cr L J	529		1919	PHCC	257
	1919	PHCC	92	134 (2)	49	IC	953		1919	PHCC	325		4	PLJ	415
51	51	IC	763	136 (1)	49	IC	839		4	PLJ	475	307	51	IC	302
	4	PLJ	325	136 (2)	50	IC	364	215	50	IC	817	309	52	IC	739
	1919	PHCC	400		4	PLJ	159		20	Cr L J	337	311	53	IC	820
53	51	IC	758		1919	PHCC	260	219 (1)	50	IC	729		20	Cr L J	820
54	50	IC	31	138	49	IC	861		4	PLJ	164	312 (1)	52	IC	746
	20	Cr L J	271		20	Cr L J	237	219 (2)	50	IC	104		1919	PHCC	372
56	59	IC	8	139 (1)	53	IC	496	224	51	IC	796	312 (2)	49	IC	383
	1919	PHCC	323		20	Cr L J	768	225	51	IC	753		4	PLJ	53
58	50	IC	520	139 (2)	50	IC	26	227	51	IC	816	313	52	IC	866
	1919	PHCC	232		20	Cr L J	266	230	49	IC	796	316	51	IC	280
59	49	IC	845	141	49	IC	948	232	50	IC	497		4	PLJ	542
61	50	IC	783	143 (1)	52	IC	177		4	PLJ	205	319	51	IC	173
67	49	IC	841	143 (2)	53	IC	818	233	51	IC	786		20	Cr L J	413
68	50	IC	778		20	Cr L J	818		4	PLJ	323	321	53	IC	821
70	51	IC	686	144	52	IC	181	234	52	IC	324		20	Cr L J	821
	20	Cr L J	526	146	53	IC	833	236	52	IC	873	322	52	IC	50
71	50	IC	454		1919	PHCC	305	237	49	IC	958		20	Cr L J	562
	1919	PHCC	147		4	PLJ	580	238	52	IC	959	324	49	IC	374
74	49	IC	522	159	50	IC	506	240	52	IC	982		4	PLJ	49
78	50	IC	162		4	PLJ	282	244	49	IC	868	325	52	IC	105
	20	Cr L J	274		1919	PHCC	242	247	52	IC	316	328	52	IC	137
				162	49	IC	733	250	51	IC	162	329	51	IC	256
81	49	IC	850	163	50	IC	451		20	Cr L J	402	330	51	IC	263
	20	Cr L J	226		4	PLJ	187	252	52	IC	956		1919	PHCC	220
84	49	IC	593	165	51	IC	697	253	51	IC	207		20	Cr L J	439
SB	1919	PHCC	65		1919	PHCC	289		20	Cr L J	431		4	PLJ	525
	20	Cr L J	177		4	PLJ	486	254	53	IC	180	334	52	IC	119
	4	PLJ	174	171	49	IC	781	257	52	IC	961	337	51	IC	260
90	50	IC	712		20	Cr L J	221	260	53	IC	301		20	Cr L J	436
	4	PLJ	163	172	49	IC	777	FB	1919	PHCC	377	339	4	PLJ	109
91	51	IC	340		20	Cr L J	217	266	49	IC	917		49	IC	346

A. I. R. 1919 Patna=Other Journals—(Concl'd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
339	20 Cr L J 154	404	49 I C 171	479	4 P L J 297	530	20 Cr L J 389
341	53 I C 826	3	P L J 636	480	51 I C 961	531	52 I C 267
	20 Cr L J 826	404	20 Cr L J 139	480	1919 P H C C 439	533	51 I C 49
343	52 I C 185	406	52 I C 523	481	49 I C 981	534	4 P L J 289
	4 P L J 371	407	49 I C 174	482	49 I C 907		1919 P H C C 262
	1919 P H C C 145		4 P L J 16	484	51 I C 27		50 I C 983
344	51 I C 320		20 Cr L 142	486 (1)	1919 P H C C 241		20 Cr L J 375
345	1919 P H C C 409	409	53 I C 96		51 I C 975	537	51 I C 77
	53 I C 892		4 P L J 505	486 (2)	51 I C 11	539	52 I C 402
350	4 P L J 609	411	53 I C 79	488	2 P L T 626	540	52 I C 416
FB	1919 P H C C 329		4 P L J 511		1921 P H C C 11	541	51 I C 15
	52 I C 193	414	53 I C 83		53 I C 153		4 P L J 561
	20 Cr L J 577		4 P L J 517		20 Cr L J 745	543	4 P L J 428
361	53 I C 931	416	49 I C 164	489	49 I C 848		52 I C 439
	20 Cr L J 835		1918 P H C C 366	490	52 I C 386	545	51 I C 840
362	52 I C 219		20 Cr L J 132		20 Cr L J 626		20 Cr L J 552
	1919 P H C C 250	417	51 I C 222	491	1919 P H C C 284	546	60 I C 175
	4 P L J 374		4 P L J 72		4 P L J 557	547	1919 P H C C 286
	20 Cr L J 603	418	53 I C 91		51 I C 36		51 I C 781
365	53 I C 922		4 P L J 500	493	52 I C 273		20 Cr L 541
	1919 P H C C 390	420	51 I C 738		20 Cr L J 609	549	51 I C 31
367	49 I C 94		4 P L J 306	494	52 I C 1002	551	52 I C 390
369	51 I C 316	422	51 I C 791	495	50 I C 1004		20 Cr L J 630
371	51 I C 307		4 P L J 309		20 Cr L J 396	554	51 I C 706
372	53 I C 41	423	52 I C 361	496	51 I C 40	556	4 P L J 485
373	49 I C 195	424	49 I C 892	497	51 I C 881		1919 P H C C 265
	4 P L 37		4 P L J 521		4 P L J 347		51 I C 833
374	49 I C 193	425 (1)	50 I C 279	501	1921 P H C C 364		20 Cr L J 545
	4 P L J 11	425 (2)	49 I C 150		4 P L J 340	561	4 P L J 682
375 (1)	52 I C 494	FB	4 P L J 94		51 I C 873		1919 P H C C 343
	20 Cr L J 670		1919 P H C C 81	503	52 I C 225		52 I C 338
375 (2)	51 I C 139	430	50 I C 529		4 P L J 381	565	51 I C 847
	4 P L J 294	FB	1919 P H C C 105	506	49 I C 664		20 Cr L J 559
376	49 I C 208		4 P L J 240	507	4 P L J 387	566	52 I C 335
	4 P L J 13	441	52 I C 501		52 I C 231	567	4 P L J 456
377	49 I C 215	442	53 I C 106	511	52 I C 282		1922 P H C C 31
	3 P L J 499		4 P L J 533		20 Cr L J 618		53 I C 939
381	51 I C 603	445	52 I C 543	514	51 I C 271		20 Cr L J 843
383	52 I C 461	447	53 I C 114		20 Cr L J 447	570	52 I C 430
	4 P L J 461	452	53 I C 150	515	52 I C 54		20 Cr L J 654
384	52 I C 491		20 Cr L J 742		20 Cr L J 566	572	4 P L J 433
	20 Cr L J 667	454	53 I C 20	517	52 I C 241		52 I C 446
386	53 I C 2		1919 P H C C 465	519	52 I C 276	573	1919 P H C C 60
	1919 P H C C 419	465	52 I C 344		20 Cr L J 612		49 I C 389
390	53 I C 16	467	49 I C 478	521	51 I C 46	574	1919 P H C C 386
392 (1)	51 I C 747	468	51 I C 767	522	52 I C 280		74 I C 202
	4 P L J 301		4 P L J 299		20 Cr L J 616	578 (1)	4 P L J 321
392 (2)	52 I C 473	469	52 I C 363	523	50 I C 546		1919 P H C C 235
395	51 I C 733	471	49 I C 962	526	51 I C 56		51 I C 69
	4 P L J 304	472	51 I C 896	527	51 I C 114	578 (2)	52 I C 398
396	52 I C 514		4 P L J 354	528 (1)	52 I C 417		20 Cr L J 638
398	53 I C 110	474	52 I C 380		20 Cr L J 641	581	1919 P H C C 25
	4 P L J 540	476	52 I C 383	528 (2)	51 I C 844		62 I C 747
399	52 I C 512	477	51 I C 846		20 Cr L J 556	583	78 I C 545
400	49 I C 198		20 Cr L J 558	529	52 I C 421	584	4 P L T 381
	1918 P H C C 232	478	50 I C 367		20 Cr L J 645		73 I C 963
403	49 I C 115	479	50 I C 328	530	50 I C 997		24 Cr L J 723

THE ALL INDIA REPORTER 1919

PATNA HIGH COURT

A. I. R. 1919 Patna 1 Full Bench

ATKINSON, COUTTS AND MANUK, JJ.
Asarfi Singh—Defendant—Appellant.

v.

Ram Khelawan Sinha and others—
Plaintiffs and Defendants—Respondents.

Appeal No. 915 of 1917, Decided on
20th December 1918, from Appellate De-
cree of Addl. Sub-Judge, Muzufferpore,
D/- 4th May 1917.

**Occupancy—Transfer of portion of non-
transferable holding—Rent decree obtained
by landlord against original tenant frau-
dulent—Transferee is entitled to maintain
suit to set aside decree.**

A transferee, without the landlord's consent,
of a part of an occupancy holding, not transfer-
able by custom, is entitled, as soon as damage
accrues to him, to maintain as against the
landlord of such holding and the original re-
cognized tenant thereof jointly a suit to set aside
a rent-decree obtained by the landlord, whether
ex parte or otherwise, against the original re-
cognized tenant, irrespective as to whether such
transferee was or was not a party to such decree,
on the ground that such decree was obtained by
the landlord by fraud and in conspiracy with the
original tenant and as a consequence whereof the
said transferee has sustained loss and damage.

[P 8 C 2]

*Saroshi Charan Mitter, Lachmi Na-
rain Singh and Awadh B. Chaubey*—for
Appellant.

Ganesh Dutt Singh—for Respondents.

Order of Reference

Atkinson and Manuk, JJ.—(28th
November 1918)—This second appeal has
been argued before us on behalf of the
defendant first party-appellant and the
plaintiff-respondent respectively. There
appear to be in this Court two conflict-
ing decisions on the point of law arising
for our determination. Much stress was
laid on behalf of defendant 1 on a deci-

1919 P/1 & 2

sion of the Divisional Bench consisting
of the Chief Justice and Mullick, J., in
Gananath Satpathy v. Harihar Pandhi
(1). In that case it was held that the
transferees without the landlord's con-
sent of a portion of an occupancy holding
not transferable by custom, cannot in-
stitute or maintain a suit to attack a sub-
sequent decree obtained by the land-
lord against the original tenant on the
ground that the decree was fraudulent
and was to the detriment and injury of
such transferees. On the other hand we
were referred on behalf of the plaintiff
respondent in this appeal to the decision
of another Divisional Bench consisting
of the late Chief Justice and Mullick,
J., in *Barhma Deo Lal v. Sheo Prasad
Lal* (2). In this case it was held that
where the unrecognized transferee of part
of an occupancy holding was allowed to
deposit under Ss. 170 and 171, Ben. Ten.
Act 1885, the amount of arrears due in
satisfaction of the landlord's subsequent
decree against the recorded tenant and
where such deposit has been withdrawn
by the landlord, the transferee being in
such circumstances in the position of a
mortgagee was entitled to maintain a
suit to challenge a still later decree ob-
tained by the landlord collusively against
the recorded tenant, enhancing the rent.
It may be mentioned that there was a
similar deposit by the transferees and
withdrawal of that deposit by the land-
lords in *Gananath Satpathy v. Harihar
Pandhi* (1).

We are of opinion that these two deci-
sions are inconsistent with each other

(1) [1918] 48 I. C. 359=5 P. L. W. 232=(1918)
Pat. 289.

(2) [1917] 2 P. L. J. 561=41 I. C. 237.

and indistinguishable in principle. The true principle governing such cases arises again for decision in the second appeal before us, on facts so similar to those in the two decisions cited above as to be, in our opinion, also indistinguishable. Another decision of our late colleague Chapman, J., in this Court in *Second Appeal No. 796 of 1915*, unreported, follows on the same lines as the decision in *Barhma Deo Lal v. Sheo Prasad Lal* (2). Moreover, there are two decisions of the Calcutta High Court on the same point in *Barhamdeo Narain Singh v. Ramdown Singh* (3) and *Gadadhar Ghose v. Midnapore Zemindari Co., Ltd.* (4). In the former it was held that a suit for a declaration by a mortgagee of a portion of a non-transferable holding that a decree fraudulently and collusively obtained by the landlord against the recorded tenant for arrears of rent, was inoperative as against the plaintiff, is maintainable. In the latter it was held that a purchaser of a non-transferable occupancy holding may maintain a similar suit in spite of his non-recognition by the landlord.

Accordingly it becomes necessary, having regard to the conflicting decisions of the two Divisional Benches of this Court and to the decisions of the Calcutta High Court cited above, that the point arising for our determination in this second appeal should be decided by a Full Bench of this Court. Under Ch. 5, Rr. 1 and 2 of the Rules of this Court, we therefore refer this case for a decision by a Full Bench and would formulate the point to be decided in the following way. Is a transferee, without the landlord's consent, of (a) the whole or (b) a part of an occupancy holding, not transferable by custom, entitled to maintain as against the landlord of such holding and the original recognized tenant thereof jointly a suit to set aside a rent decree obtained by the landlord, whether ex parte or otherwise, against the original recognized tenant, irrespective as to whether such transferee was or was not a party to such decree, on the ground that such decree was obtained by the landlord by fraud and conspiracy with the original tenant and as a consequence whereof the said transferee has sustained loss and damage, irrespective and inde-

pendent of whatever rights and privileges such transferee might be entitled to enforce under S. 47, Civil P. C. We accordingly refer this second appeal to a Full Bench of this Court for authoritative decision and final disposal.

Opinion

Manuk, J.—The suit out of which this appeal arises was instituted by respondents 1 party as joint transferees of 6 bighas 5 cottahs out of an occupancy holding of 12 bighas 1 cottah 18 dhurs from the recorded tenant, defendant 2 party in the suit. The transfer was effected by a deed of sale, dated 20th February 1907, for a consideration of Rs. 200. Of this holding defendant 1 party, now appellant, is admittedly the landlord. Defendants 3 and 4 parties are respectively sutbarnadars and purchasers of other portions of the holding, they have not appeared at any stage of the litigation, and it is common ground that their rights do not affect the question for decision. The relevant allegations in the plaint are as follows: Some five years after the transfer to the plaintiffs:

"Defendant 1 party (i.e., the landlord) in collusion with defendant 2 party (i.e., the recorded tenant, transferor to the plaintiff) fraudulently and collusively instituted a suit No. 2351 of 1912 for recovery of rent in respect of the said holding from 1316 to 1319 F., by wrongly stating the jama of the said holding to be Rs. 51-1-6, though the rent for the years in suit was paid up. In that suit only defendant 2 (i.e., the recorded tenant) was joined as a party and defendant 1 (i.e., the landlord) obtained a fraudulent and ex parte decree on 20th February 1913, in respect of his wrong claim by taking fraudulent proceeding."

The landlord executed this decree in 1914 by causing the entire holding to be put up for sale "by taking fraudulent and surreptitious measures," and got 22nd October 1914 fixed for the sale:

"When the plaintiffs came to know of this fraudulent regular suit and the execution case they, with a view to save their title to the said purchased land covering 6 1/4 bighas, deposited the sum of Rs. 348-5-9 on 8th September 1914 in Court under S. 170 (3), Act 8 of 1885 (Ben. Ten. Act) along with an objection petition stating that the said decree was illegal and fraudulent."

The plaint further avers various reasons, owing to which the suit was filed "on wrong and fraudulent allegations," in order to extinguish the plaintiffs' rights, although there were no arrears due to the landlord and although the annual jama of the holding as recorded in the survey khatian amounted to

(3) [1912] 17 I. C. 125.

(4) [1912] 17 I. C. 126.

Rs. 10 only. Finally, the plaintiffs submitted that

"they were compelled to deposit the sum of Rs. 348-5-9 and are entitled to get a refund of the same,"

at which figure they valued their suit.

They dated their cause of action as from the date of the alleged fraudulent decree and from the date of their deposit of the decretal amount. The plaintiffs' prayers may be shortly summed up as follows: 1. On determination of the allegations regarding the annual jama and other matters in the plaint:

"to adjudicate (a) that the decree passed on 20th February 1913 is quite fraudulent and collusive, null and ineffective and defendant 1 party acquired no right under the said decree and has no right to realise the decretal amount, and (b) that the execution proceedings were wholly illegal and fraudulent."

2. To set aside the decree and hold that the plaintiffs are entitled to withdraw the deposit of Rs. 348-5-9 which they were obliged to make. 3. Pending the disposal of the suit to injunct the landlord withdrawing the deposit, if not yet withdrawn. 4. If the deposit has been already withdrawn, to give the plaintiffs a decree for that sum with interest. There was an alternative prayer for rateable distribution of this sum, if it was found that the landlord was in law entitled to get a portion of the deposited money. It should be noted that this suit was instituted on 6th September 1914, only 8 days after the deposit by the plaintiffs of the decretal amount with costs, etc. It should also be noted that no question of usage or custom of transfer arises, that it is common ground that the transfer to the plaintiffs had not been recognised by the landlord defendant at the date of his decree or of the deposit, and that no question of abandonment, relinquishment or repudiation arises. In the written statement filed on 8th January 1915, the landlord defendant, who alone contested the suit, asserted that the annual jama was in reality Rs. 55-1-6 and not Rs. 10 as entered in the Survey Record, and that defendant 2 party alone stood recorded in his Sherista as tenant of the holding. He denied all the allegations of fraud in connexion with the rent suit decree and execution proceedings, and alleged his "claim in that suit was in every respect valid and true." Regarding the deposit he admitted he had withdrawn it but pleaded that he was compelled to do so,

as the recorded tenant in collusion with the present plaintiffs "got the Court to pass an order of satisfaction of the whole decretal amount in the absence of this defendant, and that for this reason, as well because the amount was deposited for the satisfaction of his decree, the plaintiffs were not entitled to recover it. The learned Munsif found that the plaintiffs had failed to prove that the decree was fraudulent, and that the landlord had recognised them as his tenants after their purchase. He therefore held that as unrecognized purchasers of a portion of the holding they could not attack the rent decree. On these two grounds he dismissed the plaintiff's suit.

On the plaintiff's appeal, the learned Subordinate Judge held that the rental of the holding was Rs. 10 only and that the recorded tenant, defendant 2, knew this; that the allegations of fraud had been fully established, and the ex parte decree was vitiated by that fraud. He further found that the recorded tenant was servant of the landlord defendant and "participated in this fraud in collusion with his master. On the question of law, he held solely on the authority of *Gadadhar Ghose v. Midnapore Zamin-dari Co., Ltd.* (4) that the plaintiffs as purchasers of a nontransferable occupancy holding, who had not been recognized by the landlord, could maintain a suit of this nature. He therefore set aside the ex parte rent-decree on the ground of fraud and ordered that the plaintiffs be allowed to withdraw the Rs. 348 deposited by them. It will be observed that the lower appellate Court inadvertently overlooked the fact that the deposit had already been withdrawn, and his order with respect to this portion of the plaintiffs' claim should have been somewhat differently framed. We are of opinion however that it was intended to be a decree for the recovery of this amount from the defendant landlord.

The subsequent course of this litigation till it came before us and the precise proposition of law to be determined by the Full Bench are sufficiently stated in the order of reference made by the Divisional Bench, consisting of my learned brother Atkinson, J., and myself. Under the rules of this Court, the case itself and not only the question of law formulated must be decided by this Full

Bench. After hearing the arguments addressed to us we are of opinion however that the decision of the case must rest on the determination of the question of law formulated in the order of reference, with respect to a portion of an occupancy holding, and it is only with this aspect of the matter that I shall now deal. The arguments on behalf of the appellant as eventually presented to us may be summed up as follows:

(1) A part transferee of an occupancy holding not transferable by custom has no rights or interest in the land which he can enforce against the landlord. (2) Such a transferee has the mere right to remain in possession without any title or rights against the landlord. (3) Vice versa, so long as the original tenancy subsists, the landlord has no rights against him; he can say to the landlord: "Sue your recorded tenant," but the landlord may not eject him. (4) The transferee is not bound by the decree for rent obtained against the recorded tenant. (5) Under the Full Bench decision of this Court in *Mahadeo Lal v. Langat Singh* (5), the transferee was not even entitled under S. 170 (3), Ben. Ten. Act, to deposit the decretal amount. (6) Ergo, the transferee cannot maintain a suit either to challenge the decree or recover the deposit.

Now the principles governing the transfer for value of occupancy holding, apart from custom or local usage, were succinctly laid down by a Full Bench of five learned Judges of the Calcutta High Court in *Dayamoyi v. Ananda Mohan Roy Chowdhury* (6). During the discussion before us there appeared to be much misconception as to the main principles there laid down, in so far as the transferee's rights against the landlord are concerned in the absence of the latter's previous or subsequent consent. Assuming the absence of custom or local usage, and assuming, too, the absence of such consent, the principles are:

(1) Where the transfer is a sale of the whole holding, the landlord is ordinarily entitled to enter on the holding; (2) (a) where the transfer is otherwise than by sale of the whole holding, and (b) where the transfer is of a part only of the holding, whether by sale or otherwise, the landlord is not ordinarily entitled

to recover possession unless there has been an abandonment within the meaning of S. 87, Ben. Ten. Act, or relinquishment of the holding or a repudiation of the tenancy.

Applying these principles, on the same two assumptions, to the first two of the three cases referred to it for decision, the Full Bench held that: (1) a transferee by purchase of a portion of such a holding is entitled to apply under S. 244, Civil P. C. (1882), as a representative of the raiyat, to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud. (2) The transferee of a portion can by suit recover possession from the landlord, who has forcibly dispossessed him. It may be noted in passing that in the third case referred to the Calcutta Full Bench the landlord was not a party and the question therein decided had reference only to the rights of the transferee as against persons other than the landlord. Those principles are irrelevant to the question now before us. In this Court the authority of this decision was not challenged by either side in the case of *Mahadeo Lal v. Langat Singh* (5) and was accepted by all the five learned Judges of that Bench including one of us. It has also been accepted in several other reported decisions of this Court. We may add with respect, that its authority, more particularly having regard to the strong composition of the Full Bench which pronounced it, is entitled to the greatest weight and we are unanimously of opinion that all the principles therein laid down should be considered by this Court as the charter governing such transferees, unless and until disturbed by fresh legislation.

Now, all that the Full Bench of this Court, Mullick, J., dissenting, laid down in *Mahadeo Lal v. Langat Singh* (5) was that a transferee by sale without the landlord's consent of a portion of an occupancy holding not transferable by custom was not entitled to deposit the amount of the landlord's decree under S. 170 (3), Ben. Ten. Act. The ratio decidendi is to be found in the judgment of Chamier, C. J., at p. 461 of 2 P. L. J. in these words:

"The result in my opinion is that the answer to the question which we have to decide depends upon whether the applicant has an 'incumbrance' as defined in S. 161. In my opinion he has not. He certainly has not either a 'lien

(5) [1917] 2 P. L. J. 457=40 I. C. 275 (F.B.).

(6) [1915] 42 Cal. 172=27 I. C. 61 (F. B.).

sub-tenancy, or easement.' Has he 'any other rights or interest created by the tenant on his holding or in limitation of his own interest therein'? These words refer presumably to some right or interest which is ejusdem generis with the opening words of the definition and not to some much larger right or interest of a different description. Upon the construction of this definition I accept what was said by Jenkins, C. J., and N. R. Chatterjea, J., in *Abdul Rahman Chowdhuri v. Ahmadar Rahman* (7)."

The construction placed upon this definition by Jenkins, C. J., is to be found in the following passage in *Abdul Rahman Chowdhuri v. Ahmadar Rahman* (7):

"It is difficult to understand why the inferior interest of a lien, sub-tenancy and easement alone should have been mentioned, if the intention was that the superior interest involved in an assignment was to be included in the general words. It runs counter to the first principles of construction. An incumbrance would not ordinarily mean or include an absolute assignment nor would it be a right or interest created on the tenure. Can it be said to be in limitation of the tenant's interest? I think not; these words appear to me to refer not to the area but to the quality of the tenant's interest. This view preserves the essential characteristics of a lien, sub-tenancy or easement, for the idea inherent in these leading words is that of a graft on a subject matter which is not destroyed but still continued, though in a modified form."

Mullick, J., in his dissenting judgment in the Full Bench case of this Court, says at p. 465 (of 2 Pat. L. J.):

"The petitioner's next contention is that even if he is not an incumbrancer the word 'interest' in S. 170 is a wider term than "incumbrance" and includes rights other than those falling within the narrow limits of S. 161. In my opinion this contention is well founded."

It is clear from this decision that all such transferees of a portion of a holding have interests which involve other rights. These rights may not always be strictly speaking, rights in the land which they can enforce against the landlord, as argued by the learned vakil for the appellants, but they are nevertheless rights qua the transfers which the law recognizes as valid against every one but the landlord, and which, under certain circumstances, the law recognizes as valid against the landlord as well, despite his non-recognition of the transfer. In other words, the law does not compel the landlord to recognise the transferee as his tenant but the law compels him to recognise and respect those rights which the law itself recognises. I conceive the nett result to be:

(1) That all such transferees of a portion of a non-occupancy holding have cer-

certain interests and legal rights which for certain purposes are limited by the provisions of the Bengal Tenancy Act, read with the provisions of the Civil Procedure Code. (2) That all such transferees have, irrespective of the Bengal Tenancy Act and altogether dehors that Act, certain legal rights which, if infringed, the common law of the land will not be powerless to protect in appropriate cases.

Once it is conceded, as it must be, and has been by the learned vakil for the appellant, that all transferees of a portion of such holdings have the right to possession even against the landlord until abandonment, relinquishment or repudiation takes place, the common law would impose a corresponding obligation on the landlord to refrain from extinguishing such rights by committing a tortious wrong in conspiracy with a third person; and if this obligation is not observed and damage to the transferee results, the common law may be invoked to vindicate those rights.

Merely because such interests may be extinguishable under certain circumstances provided by Statute, it nowise follows that they may meanwhile with impunity be illegally or unlawfully infringed to the detriment of the transferee. The appellant in this case claims that the institution of the rent suit and the obtaining of a decree against his recorded tenant were within the strict limits of his legal rights and therefore not actionable. Now the rule of the law as to this is in my opinion, clear. If any person or body of persons inflicted actual damage upon another by the intentional employment of unlawful means even though such unlawful means may not comprise any act which was per se actionable, then such person or body of persons committed an actionable wrong. Even honest or disinterested motives could not justify the employment of illegal means. A fortiori where as in the case before us it is found that the motives were dishonest and fraudulent there can be no doubt but that the wrong is actionable. As the point of conspiracy raised in this case and similar cases is one of great moment inasmuch as it may touch every trade and pursuit I propose to investigate it a little further.

In appeal, the findings of the lower appellate Court, translated into more strictly legal phraseology amount to this: that the appellant and the recorded ten-

(7) [1915] 43 Cal. 558=31 I. C. 554.

ant defendant 2, entered into a conspiracy by the employment of unlawful means, namely, the institution of a collusive suit and the obtaining of a fraudulent ex parte decree to inflict damage on the plaintiffs and did thereby in fact inflict pecuniary damage on them to the extent of the deposit they made to satisfy the complete decree and save the holding from sale. These findings bring the appellant within the rule of law, as I conceive it, enunciated above, and render his conduct actionable, for they necessarily imply that the landlord appellant has done a legal act in an illegal manner whereby there has been an infraction of the legal rights of the transferees with resultant damage to them. To adopt the language of Croke, J., in *Baily v. Merrel* (8), adopted in *Pasley v. Freeman* (9) and approved by the House of Lords in *Derry v. Peek* (10), the broad proposition of law is that:

"Fraud without damage, or damage without fraud, gives no cause of action but where these two concur an action lies."

In the last mentioned case at p. 365 Lord Herschell further observes:

"Wilfully to tell a falsehood intending that another shall be led to act upon it as if it were the truth, may well be termed fraudulent whatever the motive which induces it, though it be neither gain to the person making the assertion nor injury to the person to whom it is made."

It is true the last mentioned case was an action of deceit at Common law but in my opinion the principles would equally apply to cases like the one before us and they dispose of the argument that as the false statement of the landlord was not addressed to the plaintiffs, and they were not bound by the decree they cannot maintain their action. In *Mogul Steamship Co. v. Mc Grigor* (11), which was an action on conspiracy to prevent the plaintiffs who were rival traders from competing with the defendants and thereby causing injury to the plaintiffs, the plaintiffs failed because it was held that the defendants did no more than they had a legal right to do for the reason that it is not illegal for a trader to aim at driving a competitor out of the trade, provided the motive be his own gain by appropriation of the trade and the means he uses be lawful weapons. Lord Field, however observed at p. 52:

"Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious or have for their ultimate object injury to another from illwill to him and not the pursuit of lawful rights."

Again in *Queen v Leathem* (12), in which all the authorities were exhaustively reviewed Lord Lindley at p. 533 observes with regard to civil actions of this nature:

"The first and most important proposition is that an act otherwise lawful although harmful does not become actionable by being done maliciously in the sense of proceeding from a bad motive and with intent to annoy and harm another. This is a legal doctrine not new or laid down for the first time in *Allen v. Flood* (13). . . Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to acts otherwise lawful, i. e., to acts involving no breach of duty or in other words, no wrong to any one."

And again at p. 535 his Lordship adds:

"But if the interference is wrongful and is intended to damage a third person and he is damaged in fact, in other words, if he is wrongfully and intentionally struck at through others and is thereby damaged, the whole aspect of the case is changed. The wrong done to others reaches him, his rights are infringed although indirectly and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law as I recognize it is not so defective as to refuse him a remedy by an action under such circumstances."

Applying the above principles to the case before us I have no hesitation in holding that there need be no privity of contract or parties in order to maintain an action of this nature. It has also been urged on behalf of the appellant that inasmuch as the transferees were not entitled to deposit the amount of the decree the deposit was voluntarily made and therefore not recoverable. Now it must be remembered that this deposit was made at a time when the law as to the right of a transferee to make a deposit under Ss. 170 (3), Ben. Ten. Act, was still unsettled. So far as this province is concerned it was not settled until the decision in *Mahadeo Lal v. Langat Singh* (5), i. e., two and a half years after the deposit was made. The plaintiffs were therefore justified in adopting the only course at that time open to them to save the holding from sale; and as the landlord has since withdrawn the deposit, he cannot now be heard to say that the transferee was not entitled

(8) [1615] 3 Baistode 95.

(9) [1789] 2 Sm. L. C. 74 (12th Ed. p. 71.).

(10) [1889] 11 A. C. 337.

(11) [1892] A. C. 25.

(12) [1901] A. C. 495.

(13) [1898] A. C. 1.

to deposit the amount. Moreover, I am of opinion that the deposit should be considered as money paid under terror of inceptive legal proceedings fraudulently directed against the plaintiff and as such recoverable: see *Marriot v. Hampton* (14).

It is also urged that the full sum of the deposit should not have been decreed in this case as the measure of damage suffered and that at best the measure of damage was the difference between the recorded jama and the jama for which the landlord's suit was decreed. The short answer to this contention is that the plaintiffs clearly alleged in their plaint that no arrears were due and we must accordingly take it on second appeal that the learned Subordinate Judge has accepted this assertion and give him a decree on the basis of its accuracy. The above observations dispose of all the arguments addressed to us on behalf of the appellants as summarized above but having regard to the conflict of authority set out in the order of reference, I now turn to a consideration of the reported Indian decisions on the question before us. To take them in chronological order the first of these is *Brahamdeo Narain Singh v. Ramdown Singh* (3), in which it was held that the mortgagee of a portion of a nontransferable holding has a subsisting right though the landlord may not recognize him, that despite such non-recognition the right transferred cannot be denied, and consequently, a suit was maintainable for a declaration by such mortgagee that a decree obtained by the landlord against the recorded tenant for arrears of rent was fraudulent and inoperative as against the plaintiff.

The facts of that case were in no way distinguishable from the one before us inasmuch as there was also a deposit by the plaintiff in that case to save the holding from sale. With regard to the deposit it was held that the plaintiff's rights would have been seriously affected if the amount of the decree had not been paid by him. In *Gadadhar Ghose v. Midnapur Zemindari Co. Ltd.* (4) suits were brought by the purchaser of a nontransferable occupancy holding against the landlord for a declaration that the rent decrees obtained by him against the plaintiff's vendor were fraudulent and that the jote could not be sold in execution thereof.

(14) [1797] 2 Sm. L. C. 410 (12th Edn., p. 503).

The suits had been dismissed by both the lower Courts on the ground that the plaintiff had no interest to support his action. The High Court in remanding the cases for trial on the merits followed the decision in *Brahamdeo Narain Singh v. Ramdown Singh* (3) and two earlier decisions of the Calcutta High Court on analogous lines and held that the plaintiff was entitled to protect what interest he had in spite of nonrecognition by the landlord. Their Lordships further observed that it was open to any person affected by such a fraud to impeach it, and to sue to set aside the results accruing from such fraudulent conduct.

The first case on the subject in this Court is that of *Barhma Deo Lal v. Sheo Prasad Lal* (2). In this case it was held that where the unrecognized transferee of an occupancy holding was allowed to deposit the amount of the landlord's decree against a recorded tenant and where such deposit has been withdrawn by the landlord (though apparently after contest), the transferee was in the position of a mortgagee and was entitled to maintain a suit to challenge a still later decree obtained by the landlord collusively against the recorded tenant enhancing the rent. It was observed by Mullick, J., in that case that the transferee is vitally interested in the amount of rent payable because in the event of a second rent sale his mortgage charge would be extinguished.

The only other decision of this Court on this topic is in *Gananath Satpathy v. Harihar Pandhi* (1). In this case the plaintiffs were purchasers with the consent of the landlords of a portion of the recorded tenant's holding and were also mortgagees of another portion without the landlords' consent. In 1910 the plaintiff sued the transferor on his mortgage and duly obtained a sale certificate and delivery of possession. In 1911 the landlord sued the recognized successor-in-interest of the original recorded tenant for the rent of the holding as constituted after deduction only of that portion transferred to the plaintiffs with his consent. He obtained a decree but the plaintiffs deposited the decretal amount and the sale was not enforced. It would appear from the statement of facts that the deposited amount was withdrawn by the landlords. In 1912 the latter again sued the recognized tenant for the rent of the holding

and having obtained a decree they executed that decree and 15th July 1913 was fixed for the sale of the holding. The plaintiffs apprehending that their title to the area purchased in execution of their own mortgage decree would be jeopardized instituted a suit against the landlords and the recorded tenant praying inter alia for a declaration that the recorded tenant had no concern in that portion of the holding which the plaintiffs had purchased in execution of their own mortgage decree and that the second rent suit, the decree and the execution proceedings in respect thereof were illegal, invalid and inoperative. It would seem from the report that the last mentioned rent suit and execution proceedings were attacked on the ground of fraud but what the precise nature of the alleged fraud was is not very clear. The whole suit was dismissed by the Munsif, but decreed by the Subordinate Judge on appeal. On second appeal to this Court, Roe, J., sitting singly substituted inter alia the following declaration for those prayed for by and given to the plaintiffs by the Subordinate Judge:

(1) That the landlords' second suit against the recorded tenant was fraudulently instituted with the intention of ousting the plaintiffs from the land and (2) that no execution of any decree obtained against the recorded tenant will affect the rights of the plaintiffs. Against this decree the landlords preferred a Letters Patent appeal. The appellate Bench held that the landlord cannot interfere with the possession of such transferees and that, if he does so the transferees are entitled to recover possession by suit, but that, nevertheless, before that time comes, the transferees are not entitled to attack as fraudulent transactions and proceedings between the landlords and the recognized tenants to which they are not parties. The language employed does no doubt justify the inference, as Mr. Mitter contends, that under no circumstances can such transferees attack the decree until the landlords dispossess them, or, possibly, until the landlords attempt to dispossess them.

However that may be, this decision is, in our opinion, irreconcilable with that in *Barhma Deo Lal v. Sheo Prasad Lal* (2). In both cases there had been a deposit by the transferee with respect to a

previous decree obtained by the landlord, in both cases that deposit had been withdrawn by the landlord and in both cases the second suit and decree were held to be collusive and fraudulent. The case before us is distinguishable from both those cases only in so far as the deposit in the present case was made by the plaintiff transferee in respect of the challenged decree, and not in respect of a previous decree, but this point of distinction in no wise affects the broad principle which in our view governs such cases. In so far therefore as *Gananath Satpathy v. Harihar Pandhi* (1) purports to decide (1) that even if the transferee has made a deposit or (2) that even if the transferee has suffered actual damage by an infraction of his legal rights (irrespective of whether pecuniary damage had been sustained or not), such transferee cannot maintain an action to attack the fraudulent decree, we are of opinion with great respect that the decision is incorrect. We hold that the period at which damage accrues may vary in different cases, but that as soon as damage does accrue, a transferee of a portion of a holding may immediately institute a suit to attack all fraudulent proceedings between the landlord and the recognized tenant.

The broad proposition of the maintainability of such an action based on fraud and conspiracy under the Common law was not present to the minds of the learned Judges of this Court who decided both the cases referred to above. We prefer to rest our decision on the principles of the Common law rather than on the theory of a constructive mortgage created by a deposit, as was done in the case of *Barhma Deo Lal v. Sheo Prasad Lal* (2), and we do so quite irrespective of the fact that it is now settled law for this province that a transferee by purchase is not entitled to make a deposit under S. 170, Cl. 3, Ben. Ten. Act. We are fortified in adopting this course by the decision of the Privy Council in *Pramada Nath Roy v. Ramani Kanta Roy* (15) that a sharer, whose cosharers refuse to join him as co-plaintiffs, can bring them into the suit as defendants and sue for the whole rent, and could do this under the general principles of legal procedure quite apart from the provisions of the Bengal Tenancy Act before S. 148 (a) was added to that Act. Finally

(15) [1908] 35 Cal. 331=35 I. A. 73 (P. C.).

it is argued on behalf of the appellant that the decree should be set aside only as against the plaintiff transferee and not entirely. The short answer to this contention is that a judgment and decree obtained by fraud upon a Court binds neither such Court nor any other and is a nullity, *Shedden v. Patrick* (16) and *Reg. v. Saddler's Co.* (17).

"Fraud" observed De Grey, C. J., in *Duchess of Kingston's case* (18): "is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."

The fraud which we have here is, in my opinion, equally a fraud on the Court as on the plaintiffs and no vestige of the results of that fraud should be allowed to remain on a judicial record. I should add it has been faintly urged that the plaint as drawn does not found the action on fraud and conspiracy resulting in damage. It may be conceded that the plaint is in this respect faulty and lacking in precision, but I am of opinion that it avers all the essential ingredients necessary for such an action. It must be remembered that mofussil practitioners are not expert draftsmen and are not too familiar with the rules of pleading as applicable to such actions. However that may be, the learned Subordinate Judge's judgment and decree have relieved us of all necessity to consider seriously this objection. I would therefore answer in the affirmative the question formulated in the order of reference in so far as it applies to (b), a transferee of a part of an occupancy holding. The result therefore is that this appeal must fail and I would accordingly dismiss it with costs. In so far as the question formulated refers to transferees of the whole of the holding it is unnecessary for the decision of the appeal before us, and we prefer not to decide it without a more complete discussion of this branch of the subject than we have had in this case. We endorse however the hope expressed by the Full Bench of Calcutta that the legislature may soon intervene to set all the vexed questions with respect to this class of transferees, as well as all other classes, finally at rest.

(16) [1854] 1 M. A. C. Q. 535.

(17) [1863] 10 H. L. C. 404.

(18) [1776] 20 H. St. Tr. 537.

Atkinson, J.—I agree with the judgment of my learned brother, and Coutts, J. also desires me to express on his behalf his entire concurrence.

By the Court.—As the deposit has been withdrawn by the landlord appellant, the plaintiff will be given a decree for the amount of that deposit, viz., Rs. 348 with interest at 6 per cent. per annum from the date of the Subordinate Judge's decree. The appeal is dismissed with costs. Pleader's fee ten gold mohurs.

V.S./R.K.

Appeal dismissed.

**** A. I. R. 1919 Patna 9 Full Bench**

ATKINSON, JWALA PRASAD AND
DAS, JJ.

Radhika Raman Prasad Singh and others—Defendants—Appellants.

v.

Mt. Janki Kuer and others—Plaintiffs—Respondents.

Misc. Judicial Case No. 35 of 1919,
Decided on 28th May 1919.

**** Court-fees Act (1870), S. 12 (2)—Appeal to High Court dismissed—Respondent cannot be called upon to make up deficiency in respect of court-fee payable in lower Court.**

When the High Court dismisses an appeal from whatever cause, it ceases to have seisin of the appeal or case and is powerless to call upon the respondent to pay any deficiency due by him in respect of court-fees payable in the lower Courts, and consequently has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him.

[P 10 C 1, 2]

Sultan Ahmad—for the Crown.

Gour Chandra Pal—for Respondents.

Atkinson, J.—This Full Bench has been constituted under an order of reference made by my learned brothers Jwala Prasad and Das, JJ., with the sanction of the Chief Justice, for the determination of a point arising on the construction of the Court-fees Act. It appears that on 10th March 1919 notice was issued, by leave of this Court, on the respondent, Mt. Janki Kuar, to show cause why she should not be restrained from executing the decree obtained by her in the lower appellate Court until she paid and satisfied the deficit due in respect of court fees on her appeal to that Court. At the time that this order was passed, the appeal presented to the High Court by the appellant against the order of the lower appellate Court had been dismissed. The respondent, Mt.

Janki Kuer, appeared in response to the notice served upon her, and alleged that some of the respondents were dead, and she applied for time to substitute parties. The application was adjourned from time to time and eventually it came before a Bench constituted of Jwala Prasad, J. and Das, J., for disposal. Their Lordships were of opinion that a decision of Roe, J., and myself in a case entitled *Mahant Sadho Bhagat v. Ramrup Gosain* embodied in an order dated 31st January 1919, conflicted with a subsequent ruling of Mullick, J., and Jwala Prasad, J., in the case of *Babu Baldeo Narain Singh v. Ramdil Singh*, both cases involving the same question of principle; and that thus there was a conflict of authority between two Division Benches of this Court touching the propriety of the matter now arising for decision; and consequently with the assent of the Chief Justice they referred the application now before us for a ruling by a Full Bench of this Court, seeking a judicial pronouncement as to what the law is in such cases.

The point requiring determination may be stated as follows: When an appeal by an appellant to this Court is dismissed owing to his failure to pay the deficit due in respect of the court-fee payable by him on a memorandum of appeal or for other good and sufficient reasons, has the High Court any power or right, after dismissal of such appeal, to call on and require a respondent to make good any deficit in the court-fee due in respect of the court-fee payable by him in the lower appellate Court?

Roe, J., and myself were of opinion that the High Court had such power. Mullick and Jwala Prasad, JJ., took a different view, and held that once the appeal had been dismissed this Court was functus officio; and that the Court was powerless to make any order which could oblige or compel the respondent under the order of this Court to pay whatever deficiency might be due by him in respect of court-fees payable in the lower appellate Court, as a condition precedent to his right to execute such decree. Having considered the matter very carefully, we are of opinion that the view taken by Mullick and Jwala Prasad, JJ., is the correct view; and that once an appeal has been dismissed, the High Court ceases to have seisin of the appeal or case and

is powerless to call upon the respondent to pay any deficiency due by him in respect of court-fees payable in the lower Court and consequently that the High Court has no jurisdiction in such circumstances to restrain the respondent from executing the decree obtained by him.

It might be different if the High Court had taken cognizance of the deficiency in the court-fee payable in the lower appellate Court before the appeal was dismissed, provided the appeal had come before the Court in a proper manner, under the provisions of S. 12, Cl. 2, Court-fees Act of 1870. But once an appeal has been dismissed from whatever cause, then this Court is functus officio, and no subsequent order can be made for the recovery of any deficiency in court-fees due in the lower Courts. A similar principle was enunciated in a case reported as *Mahadei v. Ram Kishen Das* (1), in which Mahmood, J., said:

"As soon as the Judge had passed the decree of 1st March 1883 he ceased to have any power over it; and was incompetent to introduce new matters not dealt with by the judgment,"

and that to that extent the order was ultra vires. We are of opinion therefore that the correct interpretation of S. 12, sub-S. 2, Court-fees Act of 1870 on general principles is as stated herein and in accordance with the decision of Mullick and Jwala Prasad, JJ., referred to above, and consequently we declare that the order in the case referred to us was illegal and improper and that this Court had no jurisdiction to pass the order of 10th March 1919. The same is accordingly hereby set aside.

Jwala Prasad, J.—I agree.

Das, J.—I concur.

V.S./R.K.

Order set aside.

(1) [1885] 7 All. 529=(1885) A. W. N. 140.

A. I. R. 1919 Patna 10

JWALA PRASAD, J.

Sakal Singh and others — Defendants
—Appellants.

v.

Chanderdip Lal and others—Plaintiff
and Defendants—Respondents.

Appeal No. 841 of 1917, Decided on 10th January 1919, from appellate decree of Dist. Judge, Patna.

(a) Contract Act (1872), S. 69—Words "interested in payment of money" include cases of persons who are under apprehension of any kind of loss or inconvenience.

The words "interested in the payment of money" in S. 69, are comprehensive enough to

include the cases of persons, who are under apprehension of any kind of loss or inconvenience and are not restricted to cases of individuals who are sure to suffer actual detriment, capable of assessment in money. [P 11 C 2]

(b) **Contract Act (1872), Ss. 69 and 70.**
One of several judgment-debtors paying off decree—His rights to recover compensation accrues.

Where one of several judgment-debtors pays off the whole of the decree his right to recover compensation from the other judgment-debtors, whether he was interested in the property or not, accrues also under S. 70, inasmuch as the other judgment-debtors enjoyed the benefit of the payment which was not obviously meant to be gratuitous. [P 12 C 1]

(c) **Decree—Binding—Major defendant described as minor—Decree is not binding on him.**

A major defendant who is described as a minor cannot be treated as a party to the suit and is not bound by the decree passed in the suit. [P 12 C 2]

(d) **Hindu Law — Debts — Father—Decree against, is binding on sons.**

A decree passed against a Hindu father as karta of the joint family is binding on his sons as members of the family. [P 12 C 2]

Nirsu Narain Singh and Kailaspati
 —for Appellants.

Judgment.—Defendants 1 to 4 are appellants. Defendants 1 and 2 and the fathers of defendants 3 and 4 sold their interest in village Kurthowl to defendant 7 and the husband of defendant 8 under a registered kabala, dated 31st March 1903, for Rs. 2,000. The property sold was subject to a mortgage of Rs. 225, dated 8th January 1902, payable to defendant 5, and also to an ijara for Rupees 1,680. The vendees undertook to pay off the said encumbrances and retain with them the amount sufficient to pay them off, and paid only Rs. 95 in cash to the vendors. The mortgages however were not redeemed. Defendant 5, the mortgagee, obtained a decree for sale of the mortgaged property, against defendants 7 and 8, in 1905. The decree was put into execution. The appellants satisfied the decree on 25th May 1907 and brought a suit against defendants 7 and 8 and the present plaintiff as a minor through his father as guardian ad litem for recovery of Rs. 363 which was paid in order to satisfy the mortgage. This suit was decreed on 16th April 1909. The appellants in execution of their decree sold 10 karants share of Kurthowl, the mortgaged property, and some other property of the plaintiff.

On 26th February 1915 the plaintiff commenced an action in the Court of the

Munsif of Patna praying for a declaration that the aforesaid decree obtained by the appellants against the plaintiff's father, his uncle and himself, dated 16th April 1909, was fraudulent, illegal and inoperative against the plaintiff and that he was not bound by such a decree or the execution proceedings in an auction sale. There was a prayer also for a declaration that the sale held on 13th November 1912 did not affect the plaintiff's interest in the property and that possession of the plaintiff's share be awarded to him jointly with his father defendant 7. The plaintiff's suit was dismissed by the Munsif. On appeal the District Judge reversed the decree and gave a modified decree to the plaintiff directing that the interest of the plaintiff in Kurthowl property was not affected and that he be put in possession of the same jointly with his father. The claim of the plaintiff against the properties purchased by defendants 5 and 6 was dismissed.

The first ground upon which the learned District Judge has decreed the plaintiff's suit is that the payment of the mortgage decree by the appellants was a voluntary act on their part. They were not bound to pay the decretal amount. They could not therefore recover the amount of the decree paid by them from the defendants 7 and 8 and the plaintiff. I am unable to accept this view of the learned District Judge. The appellants were interested in the payment of the decree within the meaning of S. 69, Contract Act, inasmuch as they were the judgment-debtors along with defendant 7 and the husband of defendant 8 in the mortgage decree. Under the terms of the mortgage decree, the mortgaged property as well as the person and the other properties of the mortgagors, that is of the appellants, were liable. On a review of the earlier authorities on the point it was held in the case of *Serafat Ali v. Issar Ali* (1) that the words "interested in the payment of money" within the meaning of S. 69, Contract Act, are comprehensive enough to include the cases of persons, who are under apprehension of any kind of loss or inconvenience and not restricted to cases of individuals who are sure to suffer actual detriment, capable of assessment in money. The learned District Judge apparently is of opi-

(1) [1908] 35 Cal. 691=42 I. C. 30.

nion that the appellants were not bound to pay until the stage had reached when they were about to be put to actual loss by the execution of the decree against their person and property, that is after the sale of the mortgaged property.

I think that the principle enunciated in the aforesaid Calcutta case is applicable to the present case and the facts of that case appear to be very similar to those in the present case. In that ruling it was also pointed out that the right of the person who paid the amount of the decree as against the other judgment-debtor whether he had interest in the property or not accrued also under S. 70 of the Contract Act, inasmuch as the other judgment-debtors enjoyed the benefit of the payment which was not obviously meant to be gratuitous. The other reason upon which the learned District Judge has decreed the plaintiff's suit is that the property was the self-acquired property of the father and the encumbrance, with the mortgage decree, was not the father's debt but that it was a debt of one of the appellants Ramlagan, the executant of the mortgage, and that the mortgaged property itself was answerable for the encumbrance. This appears to be inconsistent with the case of the plaintiff himself. The plaintiff asserts that he is interested in the property in dispute as a member of the joint family of which his father is the karta. Unless the property was purchased out of the joint funds by the father and the plaintiff and as a part of the family property, the plaintiff could not be interested in it, and he had, therefore no share in the property which he could claim to be exempted from the sale at which the appellants purchased the property. If the plaintiff had a share in the property, he is also bound to pay the encumbrance upon the same property, which by the kabala itself the vendees undertook to discharge and satisfy. The plaintiff can have possibly no claim for any share in the property except on the basis of the kabala taken by his father. He is therefore bound by the terms of the kabala to pay the encumbrance on the same, in other words, the mortgage debt which the appellants satisfied and discharged. The third ground on which the learned District Judge has given his decision is that the plaintiff was major at the time when the suit was brought by the appel-

lants and that he was wrongly described in the suit as a minor through the guardianship of his father. It is true that the Courts below have concurrently held that he was a major, and I overrule the contention of the learned vakil on behalf of the appellants that the finding of the Courts below was without any evidence. The plaintiff gave his own evidence from which the Munsif came to the conclusion that he was major at the time. The defendants did not rebut that evidence. The learned District Judge has accepted that finding of the Munsif. It must therefore be taken that the plaintiff was not a party to that suit, but that alone does not entitle the plaintiff to a decree, for in para 1 of the plaint he says that he is a member of a joint Mitakshara family and that his father is the karta of the family. If that is so, the father being a party to the suit in which the appellants obtained a decree, the plaintiff is bound by the suit and the decree. The plaintiff is bound by the decree against the father: vide *Bhola Jha v. Kali Prasad* (2). *Bhagat Mal Suhu v. Abdul Karim* (3) and *Rughunandan Singh v. Parmeswar Dayal Singh*. (4).

I therefore hold that the plaintiff was bound by the decree and the sale. Apart from all this, it appears to me that the suit is barred by time. The suit was brought on 26th February 1915, that is, more than 3 years after the decree in question which was passed on 16th April 1909. The Munsif on this point held that under Art. 95, Sch. 1, Limitation Act, the suit was barred. It was also found that no fraud was proved, nor that the plaintiff was kept away from knowledge of the decree or the execution thereof by fraud of the defendants, as is required by S. 18, Limitation Act, so that even if the plaintiff had succeeded on the other points, the suit would have failed on account of having been barred by lapse of time. The District Judge has not addressed himself to this point. The finding of the Munsif, therefore remains unchallenged. The result is that the appeal is decreed with costs of all the Courts and the plaintiff's suit is dismissed entirely.

V.S./R.K.

Appeal allowed.

(2) [1916] 1. P. L. J. 180=34 I. C. 288.

(3) [1916] 1. P. L. J. 86=34 I. C. 23.

(4) [1917] 2 P. L. J. 306=39 I. C. 779.

A. I. R. 1919 Patna 13 (1)

ROE, J.

Tewary Kora and others—Defendants—Appellants.

v.

Bhupat Mander and others—Plaintiffs—Respondents.

Second Appeal No. 736 of 1918, Decided on 31st May 1918.

Court-fees Act (7 of 1870), S. 7 (4) (c), Sch. 2, Art. 17 (iii)—Suit for declaration that survey entry is wrong and not binding on plaintiffs—Court-fee payable is Rs. 10.

In a suit for a declaration that the plaintiffs were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong, the plaintiffs further prayed for a declaration that the entry was not binding on them:

Held: that the plaintiffs were not asking for any consequential relief and that therefore the court-fee payable was Rs. 10 under Art. 17 (iii), Sch. 2, Court-fees Act. [P 13 C 2]

Naresh Chandra Sinha and Santa Prasad—for Appellants.

Facts.—The plaintiffs brought a suit to obtain a declaration that they were occupancy tenants and not tenure-holders and that the survey entry describing them as tenure-holders was wrong and that it could not in any way be binding on them. The suit was decreed and two sets of defendants appealed. These appeals were dismissed and two separate appeals were filed by the same defendants in the High Court. The suit was valued at Rs. 1,200 and the plaint was stamped with a court-fee of Rs. 10, as being a suit for declaration only. The appeals were also similarly stamped. The Stamp Reporter submitted a report that the suit was one for declaration with a consequential relief and as such the appeals should have been stamped with ad valorem court-fees under S. 7, Cl. 4 (c), Court-fees Act. The taxing officer referred the matter to the taxing Judge and in his order of reference observed as follows:

"There is a similar case reported as *Midnapur Zamindary Co. v. Secy. of State* (1). In that case the plaintiffs applied for a declaration of their status and also for a declaration that an entry in the record as to the status of tenure-holder was a nullity. Sanderson, C. J., held that S. 111-A, Ben. Ten. Act, under which the suit was brought is to be construed strictly and that this declaration that the entry in the record is a nullity is not such a declaration as is contemplated by that section. He accordingly held that the suit was one for declaration with a consequential relief and therefore came under S. 7, Cl. 4 (c), Court-fees Act. The question is whether this suit is to be governed by this ruling. Here the plaintiffs pray not only for a declara-

tion that the entry in the Record of Rights as to the status is wrong but also that the plaintiffs are not and cannot in any way be bound by the same. If the record is wrong, it seems to me that the plaintiffs cannot be bound and that the additional prayer for the declaration that the plaintiffs are not bound by the Record of Rights is unnecessary. This however might also very well be said of the prayer for declaration in the suit reported as *Midnapur Zamindary Co. v. Secy. of State* (1) to which I have refereed, that the entry in the Record of Rights as to the status is a nullity."

Order.—I agree with the learned Registrar. Under the Bengal Tenancy Act it is contemplated that entries in the Record of Rights shall be contested by a suit under Ch. 6, Specific Relief Act, i. e., by S. 42, under which the plaintiff may ask for a declaration without consequential relief. I think it severe upon the plaintiffs that they should be accused of asking for a consequential relief, when they merely throw in redundant words that the entry in the Record of Rights is not wrong, but also that it is not binding on them. I know of no case in which the Record of Rights, though correct, would not be binding on a particular party, and in the case before me I have no doubt that what was meant by the plaintiff was merely an application for a declaration that the Record of Rights was wrong. If it was correct, it would most certainly be binding on him, and if incorrect it would certainly not be binding on him.

v.S./R.K.

*Order accordingly.***A. I. R. 1919 Patna 13 (2)**

ATKINSON AND MANUK, JJ.

Jagdamba Prasad—Appellant.

v.

A. V. Sham and others—Respondents.

Appeal No. 793 of 1917, Decided on 9th January 1919, from appellate decree of Dist. Judge, Purulia.

(a) Registration Act (1908), S. 17 — No facts apart from deed from which inference of implied surrender can be drawn—Deed must be registered.

A surrender need not necessarily be by deed, it may be implied as a fact from certain facts proved. [P 14 C 2]

A deed of surrender need not be registered if there are facts de hors and apart from the deed itself from which the inference can be drawn that there was an implied surrender in fact. But if there be no such facts apart from the deed, the deed must be registered, more especially if the surrender is to operate as a surrender of premises demised by a prior written registered instrument, such as a lease. [P 16 C 1]

(b) Civil P. C. (1908), O. 41, R. 31—Judgment of appellate Court in affirmance of

decree must show that Judge had in mind every aspect of case.

A judgment of an appellate Court in affirmance of a decree must be precise and definite and it must show with reasonable clearness that the Judge brought his mind to bear sufficiently upon every aspect of the case requiring his decision.

[P 16 C 2]

Hasan Imam, Abani Bhusan Mukerjee and Jagannath Prasad—for Appellant.

P. R. Das and Sishir K. Mitter—for Respondents.

Atkinson, J.—This second appeal comes before us from a decision of Mr. Boyce, District Judge of Purulia. Before discussing the legal points arising for decision, it is necessary to shortly state some essential facts as a foundation upon which our determination in appeal must be based. A certain area of land was in the year 1895 demised by the Pandays, who were mukarraridars thereof, to Paresh Nath Ghosh and Keshab Chandra Roy as lessees. The Pandays demised the land to Paresh Nath Ghosh and his cosharer, under a permanent dar-mukarrari grant being in effect a lease in perpetuity. In respect of the land so demised, Paresh Nath Ghosh acquired a 12-annas share and Keshab Chandra Roy a 4-annas share; and the yearly rent reserved and payable by the lessees to the Pandays was the sum of Rs. 300. The demise covered not only surface rights, but also all subsoil and mineral rights appertaining to the land so demised.

In 1908 Paresh Nath Ghosh purported to sell his 12 annas share in the demised premises to the appellants, the plaintiffs in this suit; and for which I understand he received the sum of Rs. 1,500. The appellants in pursuance of their purchase went upon the land to take delivery of possession of that portion of the land which had been sold to them by Paresh Nath Ghosh. When they went to the locus in quo they found the defendant Mr. Sham in possession of part of the demised premises and a Company or Syndicate, which had been formed by him, in possession of the remainder; and thus the plaintiffs were precluded from taking peaceful possession of this 12-annas share of the land which they had purchased from Paresh Nath Ghosh; and consequently this suit has been brought by the plaintiffs to establish their title to the lands in suit, and to recover pos-

session of the same. The defence put forward on behalf of the defendants jointly, is that Paresh Nath Ghosh himself in the year 1906 surrendered his share in the lands of Thandabari demised by the lease of 1895 to the Pandays, who accepted the surrender, as he discovered that the land was unproductive and useless for mining purposes; and that thus the plaintiffs acquired no title from Paresh Nath Ghosh by virtue of the purchase made by them on 3rd December 1906. The main issue arising for decision at the trial was whether in fact there had been a surrender by Paresh Nath Ghosh to the Pandays. The question of surrender was presented in two alternative forms.

First, it was contended that in fact there had been a deed of surrender; and, secondly, that, if not, there was, at least evidence arising from the conduct of the parties from which a tribunal of fact would be entitled to infer a surrender by necessary implication. It is clear that a surrender need not necessarily be by deed; and that a surrender may be implied as a fact from certain facts proved. The decision of their Lordships of the Privy Council reported as *Imambandi Begam v. Kamleswari Pershad* (1) clearly establishes the accuracy of this proposition. The same principle was also laid down in a recent decision in the Calcutta High Court reported as *Bengal Coal Co. Ltd. v. Monoranjan Bagchi* (2). The learned Subordinate Judge, who tried this case, dealt with both aspects of the question of surrender which I have stated, viz., as to whether there was an actual deed of surrender; and also whether on the evidence he was entitled to find an implied surrender as fact. Accordingly, the learned Subordinate Judge held that whether there was a deed of surrender or not, which was not produced, the conduct of the parties was only consistent with a surrender arising by necessary implication from the facts clearly established by proof; and he dismissed the plaintiffs' suit. That the learned Judge was warranted in finding a surrender by necessary implication from the evidence cannot be disputed. From the decree dismissing the suit the plaintiffs appealed to the District Judge. The

(1) [1887] 14 Cal. 109=13 I. A. 160=1 Sar. 732 (P. C.).

(2) [1918] 44 I. C. 297.

appeal came before Mr. Boyce, and Mr. Boyce in a short judgment of affirmance stated categorically each argument that was addressed to him in support of the case presented by the appellants and his legal decision thereon.

Although the judgment of the learned Judge is somewhat lacking in precision of expression, I think it may be fairly gathered from the whole judgment that he purported to cover by his decision all the same points as had been argued, discussed and decided by the learned Subordinate Judge. My reasons for arriving at this conclusion are as follows: In para. 1 of his judgment the learned Judge states generally that the supreme issue arising for decision was as a question of fact whether there was any surrender or not. In para. 2 of his judgment the learned Judge deals with the first argument addressed to him by the appellants; that there was a deed of surrender in fact in existence which had not been produced. The learned Judge seems to have arrived at the conclusion that there was a deed of surrender in existence when the surrender was effected; that it was given to the Pandeys; that the Pandeys have held it back and declined to produce the deed although every possible means had been taken to force them to do so if the same was in their possession. The learned Judge adds to the discussion of the argument addressed to him and his decision thereon as recorded in the paragraph of this judgment referred to above the following observation:

"This fact coupled with the letter and postcard (Exs. J and G) written subsequently by Paresh Nath leaves no doubt whatever that istafa was given."

Now much argument has been addressed to us as to the distinction between the expression istafa and istafanamah. Istafanamah speaking generally refers to the actual document or deed of surrender itself. Istafa on the other hand refers to the fact or act of surrender. We are of opinion that istafa as used in the concluding portion of para 2. of the learned Judge's judgment does not refer to istafanamah qua the actual deed of surrender, and we take the view that the learned Judge in using the word istafa, as opposed to istafanamah, was considering the question of surrender, as an act arising from the conduct of the

parties irrespective of the actual existence of a deed of surrender; and that in so viewing the facts the inferences deducible from Ex. J and G were conclusive in establishing proof of surrender in fact by necessary implication. A reference to and a consideration of Exs. J and G strongly supports this conclusion. Ex. G is of vital importance because it is a postcard written in the year 1906 under the hand of Paresh Nath Ghosh himself, to his cosharer; and it expressly states that Paresh Nath Ghosh had made formal surrender to the Pandeys because the land which was demised to him under the lease of 1895 was of no marketable value for the purpose of mining, and that he considered he was no longer bound by the original lease or its provisions, and he invited his cosharer Keshab Chander Rai to take whatever steps he might deem necessary to protect himself in the assertion of his rights as a cosharer in the demised property. Ex. J is also a document of great importance. It is a letter written by Paresh Nath Ghosh to the Pandeys in the year 1907 seeking to get from them a new lease of the property which he had already surrendered and offering to pay a substantial sum as salami if he got a new lease; and this document seems only to be consistent with an antecedent act of surrender of the premises originally demised by the lease of 1895. I think that the learned Judge was considering in more or less a confused manner the two aspects of the question arising for his decision, viz., the existence or non-existence of a surrender whether by deed or as an inference of fact to be drawn from the conduct of the parties and from which the act of surrender might be fairly implied.

The learned Judge towards the end of para 3 of his judgment discusses the second argument addressed to him, viz., whether the surrender was by deed or by conduct; even accepting that there was a surrender in fact, there was only a surrender of part of the demised premises to the extent of a 12-annas share and that a surrender of part and not of the whole of the demised premises could not operate in law as a valid surrender of all the interest conveyed by the original lease. As a second branch of this argument it was contended that if there was a deed of surrender in actual existence it was not registered, and there

fore was inoperative in law to effect a surrender of the entire property demised.

With regard to the first point as to the surrender of part and not the whole of the demised premises—admittedly the learned Judge's view was correct; and Mr. Hassan Imam has not challenged the validity of the learned Judge's decision upon this point; nor could he well do so in face of the ruling of the P. C. reported as *Imambandi Begam v. Kamleswari Pershad* (1), having regard to the form in which the demise of the respective shares was made to the lessees by the original lease of 1895. With regard to the second branch of this argument it is only necessary to observe that a deed of surrender need not be registered if there are facts de hors and apart from the deed itself from which the inference can be drawn that there was an implied surrender in fact. But if there be no such facts apart from the deed, then I apprehend that a deed of surrender must be registered; more especially if the deed of surrender is to operate as a surrender of premises demised by a prior written registered instrument such as a lease. However, in the present case it becomes unnecessary to decide this point expressly having regard to the decision of their Lordships in *Imambandi Begam v. Kamleswari Pershad* (1). The fourth and concluding paragraph of the learned Judge's judgment dealt with the third argument addressed to him, viz., whether if there had been a surrender by deed, or by implication of the leasehold premises such surrender had been in fact accepted by the Pandays. We are of opinion that acceptance or non-acceptance of the surrender by the Pandays was material only on that aspect of the case from which it was sought to infer a surrender from the facts proved. The main point addressed to us in argument by Mr. Hasan Imam in second appeal is that the learned Judge has failed to consider that portion of the case which deals with the evidence of the conduct of the parties beyond and apart from the existence of the alleged deed of surrender and that consequently his clients have not received from the learned Judge the benefit of his decision upon an essential part of the case. The case is not altogether free from difficulty; and for some time I was impressed by the force of Mr. Hasan Imam's argument; but having given the

case and the arguments addressed to us on either side the very gravest consideration, I am satisfied that the learned Judge did consider the evidence as to the act of surrender apart from the actual fact as to whether a deed of surrender existed or did not exist; and on the evidence apparently the learned Judge did find as an inference of fact, from the facts established before him, that there was a surrender by necessary implication made by Paresh Nath Ghosh, and accepted by the Pandays, and in support of these findings the learned Judge relied upon Exs. J and G coupled with the subsequent grant of a lease by the Pandays to the defendant Mr. Sham. On the evidence relied upon by the learned Judge it cannot be doubted that he was entitled to find as a fact that the interest of Paresh Nath Ghosh in the lease of 1895 had been impliedly surrendered. No doubt the learned Judge might have exercised more care, and been more explicit in the expression of his opinion, but bearing in mind always that his judgment is one of affirmance, and not reversal, the learned Judge's judgment appears to us on the whole to be satisfactory and sufficient. A judgment in affirmance of a decree must be precise and definite, and it must show with reasonable clearness that the learned Judge has brought his mind to bear sufficiently upon every aspect of the case requiring his decision, and in this case we think that the judgment appealed from satisfies the requirements of the general rules of practice; and that the decision of the learned Judge is in point of law sufficient. Consequently we are of opinion that it becomes unnecessary to send this case back for rehearing before the Judge of Purulia on the grounds argued and submitted before us by Mr. Hasan Imam. The judgment of Mr. Boyce is consequently affirmed and accordingly we disallow this appeal but without costs.

Manuk, J.—I entirely concur and have nothing more to add.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 17

ROE AND JWALA PRASAD, JJ.

Mahomad Kabir Uddin — Accused —
Petitioner.

v.

Emperor—Opposite Party.

Criminal Appeal No. 8 of 1918, Decided on 30th January 1919, against order of J. C. Chota Nagpur, D/- 3rd January 1918.

Penal Code (1860), Ss. 465 and 467—Forgery—Proof—Similarity of handwriting is not sufficient proof of offence.

To convict an accused person as the forger of a document the mere similarity of the handwriting of the forged document with the writing of the accused without other evidence of complicity, is insufficient. Were a signature purports to have been forged the strong similarity between the genuine and the forged signature is suggestive merely of a conspiracy that the genuine signature was obtained by a fraud upon the person whose signature was forged. In neither case can a conviction for forgery be maintained.

[P 21 C 1 P 22 C 2]

Mazharul Haque, Jadubans Sahai
and *Rai Guru Saran Prasad*—for Petitioner.*Govt. Pleader*—for the Crown.

Jwala Prasad, J.—The appellant Mohammad Kabir Uddin has been convicted by the Judicial Commissioner of Chota Nagpur for having forged two bills, Ex. 1 and 2, for Rs. 2,460 and Rs. 500 respectively, and Ex. 3, which purports to be a true copy of a letter No. 3221/3 M. 16, dated 24th May 1916, from the Director of Public Instruction to the Inspector of Chota Nagpur Division, sanctioning Rs. 3,000 for the purchase of machinery and scientific materials for the new Sub-Overseer Class of the Ranchi Industrial School. This copy purports to have been signed by one Solomon Tirkey, head clerk of the Industrial School, certifying that the document is a true copy of the letter mentioned above. The bill Ex. 1, mentions this letter. In bill Ex. 2 another sanctioning letter No. 3815/3 S. G., dated 5th May 1916, has been referred to, but this is not on the record and it is not known whether or not it was attached to the said bill. The bills bear date 8th September 1916, on which date they were presented to the Ranchi Treasury. They purport to have been drawn and signed by Mr. Alfred D'Silva, Superintendent of the Ranchi Industrial School. The Treasury paid the amount mentioned in the bills, namely, Rs. 2,460 in respect of Ex. 1 and Rs. 500 in respect of Ex. 2, making a total

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of Rs. 2,960. The accused has also been convicted of cheating under S. 420, I. P. C.

According to Kali Saran Mukherji, Assistant Auditor (P. W. 10), these bills were received in the Accountant-General's Office about the middle of September, and as the letters referred to in the bills as sanctioning authority had not been received in the Accountant-General's Office and as the bills were not countersigned by the Inspector of Schools, the Assistant Auditor placed them under objection and noted them in the Objection Book, Ex. 16. On 2nd November a memo., Ex. 17, was sent to the Inspector of Schools, Chota Nagpur Division, for detailed countersigned bills in respect of the said sums. The Director of Public Instruction was also written to, to supply the number and date of the memo with which the sanctioning letters referred to in the bills were forwarded to the Accountant-General's Office (Ex. 18 and 19). The bills were then locked in a safe in the Accountant-General's Office by the Office Superintendent, N. K. Mozumdar.

On 9th November Mr. Alfred D'Silva (P. W. 1), Superintendent of the Industrial School, received a letter Ex. 5, dated 8th November 1916, from the Inspector of Schools, Mr. Fawcus, asking him to submit detailed bills for the two sums of Rs. 500 and Rs. 2,460 drawn by him from the Treasury on 8th September 1916. D'Silva's son was an assistant in the Accountant-General's Office. In consequence of some statement made by him to Mr. Napier, Assistant Accountant-General (P. W. 2), the latter wrote a D. O. Ex. 16, on 11th November 1916, to Alfred D'Silva, telling him that he was informed by his son that a fraud had been committed in respect of the said sum drawn from the Treasury on 8th September on two bills purporting to have been signed by him, and asking him to place the matter immediately in the hands of the police. Accordingly Mr. Alfred D'Silva on 11th November 1916 wrote a letter, Ex. 4, to the officer in charge of Kotwali Police Station, Ranchi, informing him of the fraud committed in respect of the two bills. This has been treated as the first information and under the orders of the Sub Divisional Officer the police took up the investigation of the case. The investigation was first in the hands of Amar Nath Sub-Inspector, and Mr. Morel, Inspector

of Police. These two officers were not examined at the trial. The latter has since joined the Army at Belgaum and was examined on commission under orders of this Court during the hearing of the appeal, dated the 25th February 1918.

The two bills were received by Mr. Morel on 12th November from the Accountant-General's Office. On 17th November at 8 p. m. he arrested Madhumasih and Johan Hirange, the two peons of the Industrial School. Madhumasih made a statement to him that the forged bills were given to him by Soloman Tirkey and that he was asked to draw the bills from the treasury in notes and rupees; that Johan would be sent to help him as the amount was large; that Johan accordingly followed him to the treasury and gave his thumb impression on the treasurer's book, and that he brought the money back to the Head Clerk of the Industrial School and made it over to him, who counted it.

Madhumasih was taken to Deputy Magistrate Mr. K. C. Ray. (D. W. 2) at his house, by Morel and Sub-Inspector Amar Nath, at 10-40 a. m. of 18th November for his confession to be recorded. Mr. Ray in his evidence says that he directed the man to be taken to Court. He gives his reason for this that according to Government orders a man's confession should not be taken at once but that there should be an interval, and that D'Silva of the Industrial School had personally spoken to him and said that his peon had been wrongly arrested. Madhumasih was produced before him in Court at 2-30 p. m. on that day. Mr. K. C. Ray considered it unsafe to record his confession then and directed Madhumasih to be taken to jail, ordering that his statement would be taken in jail next day. Madhumasih's statement was accordingly taken next day in jail, with the usual warning that his confession was to be voluntary and that it would be used against him. Mr. Ray says that he explained this to Madhumasih for half an hour and that Madhumasih told him that he was penitent and had not been tutored and was willing to make the statement. Mr. Ray then gave the usual certificate that he believed the statement to be voluntary and says that he had then no doubt that the statement was voluntary. The statement was read over to, and signed by Madhumasih and is marked Ex. D.

Madhumasih has been examined by the defence. He admits having made the confession, but says that he made it under threat from Mr. Morel and as tutored by him. He admits that when bills are cashed for the Industrial School it is usually he who takes them since 1910. Madhumasih was however released from jail two or three days later.

Mr. Morel says that, on 24th November 1916, at 5 p.m., peon Chaman Ram of the Deputy Magistrate's Department at the Treasury, identified Madhumasih as the man whom he saw taking away a bag of rupees. Peon Chaman Ram has not been examined in the case. According to Mr. Morel, Madhumasih's confession was voluntarily made. He says he was informed in his office that Madhumasih who was in *hajat* wished to see him and that Madhumasih was accordingly brought into the office and then voluntarily confessed to having been given the bills by clerk Soloman Tirkey in Mr. D'Silva's office and that there was no pressure put on the man to make any statement. On 28th November Soloman Tirkey was arrested. On 19th Dhirendra Nath Ganguly was arrested. They were released on bail. About 15th December Abdus Samad Khan, P. W. 22, Inspector of Police, made some confidential inquiries. He took formal charge of the case from Mr. Morel on 2nd January and on 3rd January arrested Dhom Ali. Dhom Ali was sent up but was released later. Before Dhom Ali was released: the Inspector arrested the accused on 19th January. Inspector Abdus Samad submitted a charge-sheet on 13th February 1917. On that date Soloman Tirkey, Madhumasih, Johan Hirange and Dhirendra Nath Ganguly were released from bail and Dhom Ali was released from custody, as the police reported that there was no evidence to connect them with the occurrence. The case proceeded against Kabir Uddin alone, who was committed to the Court of Session and was ultimately convicted.

There can hardly be any doubt that the offences of forgery and cheating have been committed. The bills purport to have been drawn by Alfred D'Silva and to bear his signature. D'Silva denies having drawn or signed the bills. He further swears that no such bills were sent from him for encashment to the treasury and that his office does not use

such forms for contingent bills. The amounts mentioned in the bills were not sanctioned by the Director of Public Instruction nor was any application made for such a sanction. P. W. 11, Mahadeo Prasad, Assistant. Director of Public Instruction's office. corroborates D'Silva in the fact that no sanction for the amounts mentioned in the bills was given by the Director of Public Instruction. He also proves that Ex. 3, which purports to be a sanctioning letter, was never issued from his office nor the letter referred to in the bill Ex. 2, the trace of which is not at all found. The documents in question were therefore forged ones. The fact that they were presented at the treasury and the amounts covered by the bills were paid out has been amply proved by the evidence of the Treasury Officer (P. W. 3), the Treasurer (P. W. 8) and the Accountant (P. W. 9), and also by entries in the payment register (Ex. 14), items 72 and 73. The unauthorised register (Ex. 11) kept by the Potedars shows that the money covered by the bills was actually paid. It is unfortunate however that the potedars who actually made the payments and took the thumb impression of the payee in the unauthorised register (Ex. 11) have not been examined, but that does not affect the question as regards the payment of the bills by the Treasury. The bills were in due course sent to the Accountant-General's Office, from where Inspector Moral received them on 12th November.

The only question for consideration in this case is whether the accused forged the bills and got them cashed at the Treasury and thus cheated Government. The Court below has held against the accused. The direct evidence against the accused consists of one Dhom Ali alone, who swears that the bills were handed over to him by the accused for encashment from the Treasury and that he accordingly did present the bills, receive the money and make it over to the accused. The first and the foremost question therefore is whether Dhom Ali's evidence can be accepted in this case as reliable. A careful consideration of his evidence and the surrounding circumstances will leave no manner of doubt that he is not telling the truth. Dhom Ali's antecedents are unsatisfactory. He was a civil Court peon and was dismissed on 8th July 1915

for making a false affidavit. Previous to that he had been punished and had a bad record according to D. W. 3, Civil Court Nazir, Ranchi. He was a punkha puller in the previous hot weather in the Ranchi Zila School and was discharged a month prior to this occurrence.

There are traces of falsehood internally in his evidence. According to him all of a sudden at 10-30 a. m. on the day of the occurrence the accused, while on his way to the school, went to his house and suggested to him that he should go with him and see the Head Master about some post and while they were thus going to the school and reached the town outpost the accused gave him the documents in question with a slip asking him to go and get them passed by the Treasury and that the accused would shortly meet him there. He said to the accused that he had never cashed school bills before, but Kabir said that the school chaprasi was ill and so he must cash them. According to the evidence of this man the accused took out the bills from his pocket and handed them over to him near a public place (outpost) without any previous concert between them. This implies that the bills (Exs. 1 and 2) and the sanctioning letter (Ex. 3), as well as the slip showing that the accused wanted cash and notes, were all written out and were complete in every respect with dates and everything before the accused met this man. How could the accused be sure that he would meet Dhom Ali at his house that day and that Dhom Ali would consent to cash the bills at the Treasury? This is most unlikely. If perchance Dhom Ali had not agreed to the proposal of the accused, all labour in preparing the bills with the dates thereon would have been lost. Dhom Ali most gladly goes to the Treasury, brings the money and hands it over to the accused, and does not take anything for his trouble. There can hardly be any doubt that Dhom Ali is lying when he pretends to be so innocent in the matter. He was not even told what was the amount of the bills, nor what he would say in case the Treasury people asked him who had handed the bills to him.

The story told by Dhom Ali that some days later he left Ranchi in order to fetch ghee for the accused from Hussainabad and that he went to his cousin Mada at Sahabazpur, appears to be wholly con-

cocted. His anxiety to go to his ancestral home is mysterious. He was born at Ranchi, is 50 years of age and had never before been to Sahabazpur. His cousin Mada had not asked him to visit him. In fact they were not even known to each other. Dhomb Ali had not written to his cousin for the last 12 years and has no property in the village, nor a house even. Mada says that he had never seen him before and when he saw Dhomb Ali, questioned him who he was. Dhomb Ali did not go to Hussainabad at all and fetch the ghee. He was not even told what quantity he was to bring. His wife Mt. Khedarva's evidence on the point is worthless. She says that he was arrested 8 days after he arrived but no police had come to her and asked about Dhomb Ali before he returned. It is therefore clear that if Dhomb Ali at all went away at the instance of the accused, he did so with mutual understanding to keep away from the police. He is thus lying upon this point also.

From the evidence of the prosecution itself it would appear that he has been put forward as an accomplice, and not as an innocent tool. Inspector Abdus Samad Khan, P. W. 22, says that Anwar Khan might be an accomplice; the Judicial Commissioner also says that there could be no doubt that Dhomb Ali was an accomplice and not a mere tool. Dhomb Ali therefore is not telling the whole truth and it is unsafe to convict the accused upon the sole testimony of such a witness. Except the statement of Dhomb Ali, there is no external evidence to show that Dhomb Ali actually cashed the bills. The payment at the Treasury is made by the potedars, who take either signatures of payees, or in the case of illiterates their thumb impressions. Where the thumb impression is taken, the potedars write the name of the payee against the thumb impression. This is done in a book (Ex. 11). Dhomb Ali says that he can read and write, and he told so to the Babu (probably the Assistant Treasurer, Makhan Lal, not examined in the case), who gave him the notes, but the Babu said that there was no pen and ink handy and that he could thumb the book. His signature was not taken in the book. The thumb impression in the book is so blurred that the expert failed to give any definite opinion as to whether it tallied with that of Dhomb Ali on slip Ex. 8.

The names of the payees who gave thumb impressions in Ex. 11 are written except that of the payee in the present case: so that from this payment book it cannot be shown that the money covered by the bills was paid to Dhomb Ali.

There were four potedars at the Treasury, Raghu Nandan, Sarwan Anwar Khan and Madho Prasad. None of them has been examined to prove that the payment was made to Dhomb Ali. According to evidence, probably Raghunandan or Anwar Khan, potedars, made the payment, and their not having been called by the prosecution is not only highly suspicious but also deprives the prosecution of the important evidence in the case regarding the identity of Dhomb Ali with the payee at the Treasury. It is strange that there is no evidence that any of the Treasury people saw Dhomb Ali at the Treasury in connexion with the presentation or cashing of the bills. The prosecution has not examined the Assistant Treasurer, Satyendra Nath Sen, to whom Dhomb Ali first handed the bills, nor Makhan Lal, another Assistant Treasurer (called short, young, fair, spectacled Babu), who according to Dhomb Ali handed the notes to him. Dhomb Ali further says that when he was taking the tray between the rails, some money fell down. At that moment one Punit helped him and handed the tray over the rails. Punit was known to Dhomb Ali from 8 or 10 years before; they had worked in the same place. Yet Punit has not been examined. No explanation has been given as to why these persons were not examined as witnesses.

There appears to have arisen some question at the Treasury about the correctness of the bills (vide the evidence of P. W. No. 9). This was the first abstract contingent bill from the Superintendent of the Industrial School, which the Accountant says he passed. He had some suspicion about the form. He consulted his assistant. The bills of the Industrial School generally used to be presented by one of the chaprasis of the school, Madhumasih or Johan. In fact the bills of public offices were generally brought to the Treasury by chaprasis of the respective offices. The Accountant says that only a day before (7th September 1916) Madhumasih had drawn two bills. The Treasury people as well as the potedars who immediately used to make the payments would certainly have known that

Dhom Ali was not the man who would ordinarily present the bills; and when there was some doubt as to the form used, the Treasury people would hesitate to make the payment and at least would have their attention fully fixed upon the payee.

In order not to rouse the least suspicion, it would have been more natural to have the bills presented by one of the peons in the Industrial School than to entrust them to a man like Dhom Ali. Whether Madhumasih's confession is true or not, it is not unlikely that he might have presented the bills to the Treasury. On this point also the prosecution failed to examine Chaman Ram, peon of the treasury, Deputy Magistrate's Department, who, on 24th November 1916, at 5 p. m. identified, before Mr. Morel, Madhumasih as the man whom he saw taking away a bag of rupees vide the evidence of Inspector Morel taken on commission.

From all the circumstances in the case it is certain to my mind, as it was to the Judicial Commissioner, that the Treasury people, and notably the potedars, were in the conspiracy to cheat Government in respect of the money covered by the bills and that has thrown a great obstacle in the way of the prosecution to place before the Court the most important and material evidence in the case with regard to the actual payee. The Judicial Commissioner has relied upon the evidence of Kolha Dusadh as corroborating Dhom Ali, but Kolha Dusadh did not see him cashing the bills but saw him at some distance. Besides, it is not safe to rely upon his evidence in face of what has been said above. There is therefore no reliable evidence that Dhom Ali presented or cashed the bills. His statement cannot be relied upon, as already shown, and hence the accused cannot be convicted upon the sole testimony of Dhom Ali. I have shown that the oral evidence connecting the accused with the offence of which he has been convicted is utterly unreliable. My learned brother has dealt with the question of the similarity of the writing of the forged letter and bills with the writing of the accused. I agree in thinking that mere similarity of writing without a tittle of other evidence of complicity in the conspiracy in pursuance of which the forgery was committed, is insufficient to justify a conviction for forgery; as ob-

served by Best in his book on "Evidence", Edn. 11, p. 238,

"Standing alone, any, of the modes of proof of handwriting by resemblance are worth little; in a criminal case nothing,—their real value being as adminicula of testimony."

It is not therefore necessary for me to consider the value of the expert's evidence on the question of similarity, not the patent points on which it may be suggested that the accused without doubt made the documents which are the basis of the charge against him. I agree that the appellant should be acquitted and discharged.

It has already been noticed in this judgment that the treasury people were probably in the conspiracy and that there was great carelessness in not comparing the signature of D'Silva in the treasury office with those on the bills, particularly when they were not on proper form and when this was the first time that such bills were presented on behalf of the Industrial School.

Roe, J.—I had the advantage of reading the judgment in which my learned brother deals with the oral evidence against the accused. It is not necessary, therefore for me to state the facts of the case, or to deal with this part of it. It is sufficient to say that, in my opinion, the investigating officer have touched only the fringe of the case, and have discovered nothing beyond the fact that it was the accused who wrote the body of the false document, the basis of the charge. The strong similarity between the forged signature and Mr. D'Silva's genuine signature suggest that his office must have been in the conspiracy, that is, that his genuine signature was obtained to these bills by a fraud upon him by his own office. The pretended ignorance of the treasury amla as to who cashed the bills suggests that they were in the conspiracy. Both Dhom Ali and Madhumasih must have been known to them. The treasury amla must know which of them it was who took the money. The blurred thumb impression confirms the suspicion arising from their pretended ignorance. Madhumasih's confession is far more probably true than false. Both Mr. K. C. Ray and Mr. Morel were convinced of its truth. If indeed the accused made the false documents, he made them as a minor member of this widespread conspiracy. Owing to

the fact that the Crown witnesses were equally prepared to inculcate Solomon Tirkey before the police and the accused before the Courts as the prime mover, there is no evidence at all as to what share the accused had in the conspiracy. That he was implicated in the conspiracy I have no doubt.

I have never been prepared to accept the evidence of an expert in handwriting, unless it tallies with the evidence of my own senses. In this case Mr. Brewster deals with the case as one of feigned writing. A comparison of that part of the forged document which is written with a fine pen with the ordinary handwriting of the accused when using a fine pen, and of that part written with a broad pen with his handwriting when using a broad pen, shows that the handwriting in each case is his ordinary writing and not feigned at all. I am satisfied that the accused wrote the body of the false document, but that is not in itself sufficient to justify his conviction. It was necessary to prove further that he fraudulently obtained upon them the signatures of Mr. D'Silva and Solomon Tirkey or made those signatures himself. This the Crown has failed to prove. I am not in the circumstances of the case prepared to assume that he did so. I am of opinion that the appellant should be acquitted and discharged.

V.S./R.K.

Appeal accepted.

A. I. R. 1919 Patna 22

JWALA PRASAD AND THORNHILL, JJ.

Ghasi Ram and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 217 of 1918, Decided on 18th July 1918, against order of Sub-Divisional Magistrate, Bihar (Patna).

(a) Criminal P. C., (1898), S. 107—**Disturbance of public tranquillity must be established—Individual connexion with dispute must be shown.**

In order to support a proceeding under S. 107 it must be shown that there are definite facts from which inference can be warranted that the persons charged would disturb the public tranquillity unless preventive measures under S. 107 are adopted and further the evidence must show that the persons sought to be bound are individually and not merely collectively connected with those facts. [P 24 C 2]

(b) Criminal P. C. (1898), S. 107—**Dispute between two parties as to civil rights—Order binding down one party is undesirable.**

Where there are disputes between two parties

as to their civil rights in respect of the management and control of certain temple, it is not desirable that one party should be bound down so as to give an advantage to the other side.

[P 26 C 1]

Hasan Imam, H. L. Nandkeolyar, S. K. Banerji and Abhani Bhusan Mukherji—for Petitioners.

The Government Advocate—for the Crown.

Jwala Prasad, J.—The petitioners in this case have been ordered by the Sub-Divisional Magistrate of Bihar to execute bonds to keep the peace for one year under S. 107, Criminal P. C. The order of the Magistrate was passed on 26th March 1918. The petitioners moved the District Magistrate under S. 125, Criminal P. C., to cancel the bonds. The District Magistrate by his order of 10th May 1918 rejected the application of the petitioners and confirmed the order of the Subdivisional Officer. The petitioners have now moved this Court to set aside the aforesaid order of the Magistrate directing them to execute bonds in order to keep the peace.

The petitioners are the servants of the Digambari sect of Jains. The petitioner No. 1 is the manager on behalf of that sect, opposite party Amrit Mal is the manager on behalf of the Sitambari sect of Jains. The dispute between the two sects has been going on for sometime. The dispute relates to certain temples both in the Busti and on the hills of Rajgir. These temples are of great antiquity and are held in reverence by both the sects of Jains. About the year 1909 the survey Record of Rights was prepared. As regards the Busti temples the opposite party Amrit Mal was recorded in the survey as the manager of the temples and the right of the Digambari sect was recorded to be that of worshipping in the temples and entering some of the rooms of the temples for that purpose. As regards the temples on the hills there was some dispute between the landlords and the Sitambari as to the status of the Jain society in the temples and the lands appertaining thereto. The Digambari sect was not a party to that litigation; it was terminated by an order of the settlement officer, dated 18th September 1911. Shortly after the dispute between the parties there cropped up proceedings under S. 144, Criminal P. C. These proceedings, however were set aside by the Calcutta High Court by

its order of 1st March 1912. The order is in the following words:

"We are of opinion that this Rule must be made absolute on the ground on which it was issued. It is stated by the Magistrate himself that there was no urgency about the matter and we must say that it is a very great pity that the Magistrate should have interfered between two sects of Jains who appear to have always lived peaceably together and we can see no reason whatever for any order under S. 144, Criminal P. C. The order of the lower Court is discharged and the Rule made absolute."

Not only that the parties lived peaceably about that time but up to 1916 we do not hear of any serious breach of the peace between the parties. In the year 1916 however the Magistrate thought that there was some indication of strained feelings between the parties tending to a breach of the peace. Proceedings under S. 145 were then instituted. The Subdivisional Magistrate decided the S. 145 case in favour of the opposite party by his order of 16th April 1917. The Magistrate's order was set aside by this Court on 3rd July 1917. The Magistrate in his judgment had recorded the following findings:

"(1). That the management and control of the hill temples in the correct sense of the phraseology does not vest in either party. (2). That since the last few years the Digambaris have got a separate Dharamsala, a separate Bhandar and a separate man to look after their pujas; (3) That whatever acts of management in the shape of repairs, etc., are exercised they are exercised by the first party; (4) That in view of the above findings I forbid the second party from interfering in the acts of managements of the first party until they get an order from a proper Court adjudging them to be entitled to do so."

The Magistrate had further held that none of the parties had recently repaired the temple and that nothing had been done by them except the white-washing of the temples; that both the Digambaris and Sitambaris exercised unrestricted worship and that the pathway on the hill was made when both sides were joint and that the removal of obstructions to the pathway is now done by both. These findings of the Magistrate were held by Chapman, J., as affording no basis for a finding of separate possession or for a final order under S. 145. On 25th October 1917 about two months after the order of the High Court some fracas occurred between the Digambaris and Sitambaris, which led to a prosecution of the present petitioners under S. 147, I. P. C. The Police in the meantime submitted a report recommending that

both parties be bound down under S. 107, Criminal P. C. This report is dated 12th November 1917. The dispute between the parties is stated in col. 3 of the report. The claim of the first party (Sitambaris) was that the management and control of the Rajgir hill temples was since a long time in their hands and that the Digambaris have no concern with the act of management of the temples. On the other hand the Digambari second party claim the right to repair and white wash the temples. The history of the dispute between the parties appears to have been stated by the Sub-Inspector in col. 6 of his report. The report says: "that the temples on the hills were for a long time in the management of the Sitambaris and that both the Digambari and the Sitambari Bhandars were joint and that the repairs to the pathway, the white-washing of the temples and the cutting of the jungle, etc., were done by the Digambaris out of the donation money received from the pilgrims of both the sects. That in 1911 (about the survey disputes) the Digambaris came to Rajgir and built their kothis and Dharamsalas and began to repair and white-wash the hill temples with their own money. On 20th December 1911 Amrit Mal, the manager of the Sitambaris, filed a petition under S. 144 against the Digambaris in the Bihar Court and on 18th January notice under S. 144 was issued against the Digambaris. But the order was discharged by the High Court on 18th March 1912. That on referring to the bahis and khatahs of the Digambaris it transpired that they have been doing repair to the temples, etc., since their arrival in 1912. That on 13th June 1916 Amrit Mal, the Sitambari manager, again filed a petition under S. 144 against the Digambaris on the occasion when the latter had taken some bricks upon the hill for the repair of the temples, mentioning that the hill temples were managed by and were in possession of the Sitambaris and that the Digambaris had no concern with the management of the said temples."

The Sub-Inspector then referred to the result of the S. 145 proceedings. He summed up his report in the following words:

"That the Sitambaris want to disallow the Digambaris by force from white-washing of the temples, while the Sitambaris are determined not to leave out the work at any risk."

The Sub Inspector therefore recommended that both parties should be bound down. The Magistrate issued notice upon both parties. In the proceedings under S. 107 as well as in the order-sheet the dispute is mentioned to be

"with regard to the right of repairs, worship, etc., of the Jain temples situated on the hills at Rajgir."

The parties were separately tried under S. 107, Criminal P. C. by the Magistrate with the result that both parties were

bound down by the Subdivisional Magistrate. Then they moved the District Magistrate. The District Magistrate discharged the first party whereas confirming the order against the second party who are the petitioners in this Court. It is conceded by the learned Government Advocate who appears in support of the order of the Magistrate that the second party have an unrestricted right of worship in the hill temples and that the notice under S. 107, Criminal P. C., as well as the order of the Magistrate restraining them from worshipping in the temples is bad. The whole dispute therefore is with regard to the right of the repairs, etc., of those temples. The order of the Magistrate is based entirely upon the evidence of practically two witnesses in this case. Their evidence has been summarised by the Magistrate in his judgment. But that summary does not show any evidence of any specific act done by the present petitioners whereby a breach of the peace could be anticipated. The Magistrate's order is based upon the finding of fact that the feelings between the parties are strained and that there is a mutual hate and distrust and counter-charges on each side. From this the Magistrate concludes that:

"an outburst of pent up feelings may occur at any moment in some violent form if Ghasi Ram continues to try and oust the Sitambaris and establish the Digambari's superiority."

He has referred to the Settlement Records of 1909 to 1911 to show that Amrit Mal was the manager of the hill temples. He has also referred to his own finding under S. 145, Criminal P. C., that the white-washing of the hill temples was done under the control of Amrit Mal and that the Digambaris had an unrestricted right of worship. As to the Magistrate's finding under S. 145, Criminal P. C., I doubt very much whether it can be used for the purpose of showing that the right of white-washing of the temples or making any repairs thereto was under the control of Amrit Mal. Whatever his findings were in that case were nullified, inasmuch as his final order under S. 145 was set aside by the High Court. The Digambaris, who represent that sect in this case, had no opportunity of testing the correctness of that finding, inasmuch as the order of the High Court was in their favour and they could not bring a regular suit to set aside the particular

finding of the Magistrate which affected their interest. The finding of the Magistrate therefore lost the most important characteristic of being a final decision between the parties. The Settlement Records of the years 1909—11 cannot be the surest basis for a finding that the state of affairs continued up to the present moment. In fact the report of the Sub-Inspector quoted in extenso in the earlier part of this judgment will show that he as a local officer was of opinion that the Digambaris since 1911 had been repairing and white-washing the temples on the hills. It is also clear from the proceedings under S. 144 in the year 1912 shortly after the preparation of the Records of Rights that the Digambaris had been interfering with the rights of the Sitambaris as to the exclusive management and repairs of the temples. The Magistrate ought to have come to a finding as to the right of the parties claimed in the case regarding the repairs and white-washing of the temples upon the evidence in the case. The evidence in this case was perhaps too meagre to tempt the Magistrate to base his finding as to the right of the parties upon it. The Additional District Magistrate who disposed of the application under S. 125, Criminal P. C., has taken the same view that I have taken of the finding on the evidence in the case. He says:

"It is true that in this record the evidence deals with the sect as a whole rather than with any particular individual of it. As for specific evidence it is contained partly in references, in themselves somewhat obscure, to a case which is at present sub judice."

At another place the Magistrate says "that the record in this case was not very complete. The District Magistrate has based his judgment entirely upon the ground that there is a long standing dispute between the parties. He thinks that it is not necessary to await the taking of proceedings under S. 107, Criminal P. C., until some overt act is committed by the parties or until an actual breach of the peace occurs. I do not feel inclined to agree with the views of the Courts below. It was held in the case of *Pran Krishna Shah v. Emperor* (1) that in order to support a proceeding under S. 107 it must be shown that there were definite facts from which an inference could be warranted that the persons charged would disturb the public

(1) [1904] 8 O. W. N. 180=1 Cr. L. J. 58.

tranquillity unless preventive measure under S. 107 is adopted and further that the evidence must show that the persons sought to be bound are individually and not merely collectively connected with those facts. In that case also the disputes were between two factions and the enmity between the two was of long standing and several members of each side were proceeded against. Ultimately the Magistrate had passed an order binding down both parties. The order was set aside also upon another ground, namely, that the evidence was far too vague to justify an order under S. 107. Similar was the view taken in the case of *Queen-Empress v. Abdul Kadir* (2). The most striking case resembling the present one is that reported in 9 I. C. 1026 [*Sher Khan v. Emperor* (3)]. In that case two batches of persons residing in one village were bound down to keep the peace under S. 107; one batch consisted of Hindus and the other batch consisted of Mahomedans. It was found that enmity existed between these two sections of the population and that there were some previous cases also between the parties but that there was nothing very definite to prove against the Mahomedans who had been bound down. It was held that according to law it was necessary that there should have been something to go upon with reference to each accused person individually. As regards the other batch, namely, the Hindus, it was said that there was no proof of violence by any of them and that there was no case pending against the Hindus for using violence. Both parties were discharged. With regard to a particular case then pending in which three of the persons bound down were accused, it was said that the matter could not be taken into consideration as it was sub judice. This would apply to the occurrence of 25th October which was tried separately and was sub judice when the proceeding under S. 107 was instituted.

Referring to the evidence itself it would appear that there is absolutely no evidence against the persons accused for the purpose of binding them down. Witness 1 on behalf of the first party does not refer to any incident in his examination-in-chief, showing that the petitioner ever did commit any act which would

make a breach of the peace on their behalf imminent. All that he says is that the disputes between the Sitambaris and Digambaris have been going on for the last five or six years. He refers only to the occurrence of 25th October which resulted in the acquittal of the present petitioners from the Court of the District Magistrate. That incident cannot at all be used for the purpose of showing that any wrongful act on behalf of the petitioners was committed; in the second place, referring to that incident the Additional District Magistrate himself, while setting aside the conviction of the petitioners, held that the collision between the parties was by chance and that it is impossible to say who were the actual aggressors, though it cannot be denied that the Sitambaris had the more cogent motive to attack. He accepted the defence version in the following words:

"But as to the circumstances under which the two parties met the defence version is, in my opinion, to be preferred. The Digambaris had gone to the spot for the purpose of completing the work on hill No. 2 which they had already begun and not for the purpose of interfering with the work of the Sitambaris on hill No. 5."

The incident therefore of 25th October cannot be accepted as an act of aggression on the part of the petitioners and would not justify an order binding them down on that ground. As to the interference with the right of the first party to repair the temples, witness 1 says:

"I know S. 145, Criminal P. C., matter is decided. No repairs were done by the Sitambaris between the decision of the S. 145, Criminal P. C., matter and Assin last. The work of repairs was going on since 3 days before the day of marpeet. For two days the white-washing was done to the temples on the 1st hill and the third day to the 5th hill. The Digambaris offered no resistance nor did they threaten us. The pathways were cleared two days before the occurrence. The Digambaris did not go to white-wash any of the hill temples."

The evidence of witness 2 is of the same character. Witness 3 is the Sub-Inspector. His evidence also does not disclose anything against the present petitioners; he refers only to the dispute between the Digambaris and Sitambaris, the contending factions, and in his opinion both parties should have been bound down. Upon this evidence it is impossible to hold that there is sufficient material on the record for a proceeding under S. 107 against the petitioners.

(2) [1887] 9 All. 452.

(3) [1911] 9 I. C. 1026.

would therefore quash the order of the Courts below upon that ground alone, namely, that the evidence is sufficient for the order passed against the petitioners. Now much has been said in this case about the rights of the parties with regard to the management and repairs of the temples. The rights of the parties are based entirely upon certain documents filed in the case as evidence. According to the entries in the survey Record of Rights the exclusive right of management of the temples is claimed by the first party on behalf of the Sitambaris but it is not denied that the Digambaris have a right of worship and a right of access to the temple for that purpose. Since the preparation of the Record of Rights in 1911 they have been overtly asserting their right in the hills; they have started their own Dharamsalas (rest houses) and the Bhandars and probably they are now receiving separately the offerings to the dieties from the Digambari sect. Indeed there is no clear evidence upon this record to come to a definite finding that the Sitambaris had been in exclusive enjoyment of the management of temples or the right to repair and white-wash them during the last five or six years. Regard being had to the disputes between the parties as to the civil rights in respect of the management and control of the temples, it is to my mind undesirable that one party should be bound down so as to give an advantage to the other side. In the case of *Dindayal Mozumdar v. Emperor* (4) their Lordships pointed out:

"But the preventive jurisdiction of a Magistrate must be exercised with caution. Where its exercise may lead to the infringement of an undoubted civil right, where an obligation which the law of the country imposes becomes incapable of being enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party, the Magistrate should not bind down the party who has the legal right in him. In a case involving the question of possession of land, a finding as to prevent possession may be sufficient. But in most other cases, if there are doubts as to the respective rights and obligations, both parties may be bound down until the rights and obligations are determined by a proper tribunal. To bind down one and not the other party in such a case encourages the infraction of legal rights under cover of legal authority, a state of things which ought to be avoided."

(4) [1907] 34 Cal. 935.

Now the petitioners in this case could not be bound down even if it were shown that they were interfering with the right of the repairs of the temples of the other side unless it was conclusively shown that such a right existed in the Sitambaris to the exclusion of the Digambaris. It is clear however from a perusal of the judgments of the Courts below that there is no clear finding as to the rights of the parties and upon the materials in this case the Courts below could not possibly come to a definite finding in the case. Under all these circumstances the order of the Magistrate should be set aside and the petitioners discharged from their bail bonds.

Thornhill, J.—I agree. To my mind the cases referred to by my learned brother conclusively show that the evidence in this case is completely insufficient to support an order under S. 107, Criminal P. C. These two sects of Jains who have for years been disputing appear to have kept outside the clutches of the criminal law and to have behaved in a reasonable manner. In the present case the evidence is very meagre, consisting only of indefinite statements by two partisan witnesses and a reference to petitions and orders in former disputes. I am therefore in entire agreement with my learned brother that the order of the Magistrate cannot stand.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 26

JWALA PRASAD, J.

Mahesh Sahu and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 52 of 1918, Decided on 25th February 1918, from decision of Magistrate, Arrah, (Sahabad.).

Criminal P. C. (1898), S. 522—Mere conviction under S. 448, Penal Code is not sufficient for order under S. 522—Offence must be attended with Criminal force.

A mere conviction under S. 448, Penal Code, does not justify an order under S. 522; Criminal P. C., unless it is found that the offence was attended by criminal force as expressly mentioned in the latter section. Mere show of criminal force is not sufficient. [P 27 C 2]

L. N. Singh—for Petitioners.

Harihar Prasad Sinha—for the Crown.

Judgment.—The petitioners have been convicted under S. 448, I. P. C., on a charge of having,

"entered into the house of one Mt. Manki in order to take by force the possession of her house."

Mt. Manki, the complainant, was a widow of one Biltu. Upon the death of Biltu she married Biltu's brother Paltu. The house in question belonged to Biltu and fell to the share of Maheshi, son of Biltu, on partition between him and Basudeo. The partition was by registered deed, dated 29th November 1916 (Ex. A). The accused has purchased recently the house in question from a prior vendee of Maheshi. The trying Court had also convicted the accused under S. 323, I. P. C., of having caused hurt to the Mussamat in the course of evicting her from the house. The lower appellate Court has disbelieved the story of hurt and has acquitted the petitioner of the offence under S. 323. There is no finding of any force having been used by the accused to to the Mussamat nor of any overt act by which the intention of the accused to use force could be inferred. The Court below in one place says: "On the whole I think Mahesh wished to take possession of the house by force." Mere show or desire is not sufficient. The trespass must be with one of the intents mentioned in S. 441. Moreover it appears from the findings of the Court below that the accused entered the house in the exercise of a right conferred on him by virtue of the sale deed executed by the vendee of Mahesh, who has been held by the Magistrate to be the true owner of the house.

The Magistrate has held that "the complainant has got no right to the house" and that it fell to the share of Mahesh under a registered partition deed and that the Mussamat was occupying it "with the consent of her son, Maheshi." The entry therefore of the accused was not at all unlawful. The accused had a right to take possession of the house. There is no finding that the intent of the accused was to intimidate, insult or annoy. The charge also does not mention such an intent. The observation of the Magistrate that "it must be seen that the house trespass was to insult and to beat her," does not amount to a finding at all and no facts have been found to raise the inference that the intention of the accused was to insult and to beat. The trespass, if any, committed was therefore in the bona fide assertion of the petitioner's claim or right. The conviction must

therefore be set aside and the accused are acquitted. The fine, if already realized, must be refunded. The order under S. 522, Criminal P. C., dated 22nd January 1918, passed by the Subdivisional Magistrate of Sassaram directing that the house in question be restored to the possession of the Mussamat, was also bad inasmuch as mere conviction under S. 448, I. P. C., would not justify an order under S. 522, Criminal P. C., unless it was found that the offence was attended by criminal force as is expressly mentioned in the latter section. Mere show of criminal force is not sufficient; all the High Courts concur in this view: *Vide Ram Chandra Boral v. Jityandria* (1), *Srihari Shome v. Lal Khan* (2), *Saita Biswal v. Dochhi Stri* (3), *Batakala Pottiavadu, In re* (4), *Narayan Govind v. Visaji* (5) and *Churaman v. Ram Lal* (6). Moreover, in this case the conviction under S. 448, has been set aside. The order under S. 522, cannot therefore stand and is hereby set aside. If the order of the Magistrate has already been carried out, status quo ante should be preserved and the possession of the house restored to the petitioner.

V.S./R.K. Conviction set aside.

- (1) [1898] 25 Cal. 434.
- (2) [1901] 5 C. W. N. 250.
- (3) [1903] 7 C. L. J. 175.
- (4) [1903] 26 Mad. 49.
- (5) [1899] 23 Bom. 494.
- (6) [1903] 25 All. 341.

**** A. I. R. 1919 Patna 27 Full Bench**

ATKINSON, COUTTS AND MANUK, JJ.
Mt. Kesar and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 201 and 209 of 1918, Decided on 12th December 1918, from a decision of Sess. Judge, Muzaffarpur, D/- 2nd September 1918.

(a) Penal Code (1860), S. 361 — Person lawfully entrusted with care or custody of minor is included in lawful guardian.

The intention of the legislature was by virtue of the explanation appended to S. 361 to extend the application of the term "lawful guardian" so as to include and embrace within the accepted meaning of this legal term "a person lawfully entrusted with the care or custody of a minor."

[P 31 C 2]

* (b) Penal Code (1860), S. 361 — S. 361 and explanation appended thereto are express and exhaustive in their terms.

Section 361 of the Penal Code and the explanation appended thereto are express and exhaustive in their terms, and in order to constitute the

offence of kidnapping or abduction there must be in fact duly, properly and legally proved, a taking or enticing away of a minor from the custody of the following persons; (a) the natural guardian; (b) the legal guardian, if the natural guardian be dead or (c) a person lawfully entrusted with care and custody of a minor. [P 32 C 1]

*** * (c) Penal Code (1860), S. 361, Expl. —Intention of explanation —Making of declaration of trust by competent person and its acceptance are contemplated.**

What the law contemplates by the explanation to S. 361 is a declaration of trust, by one competent to make such a declaration, conveying, handing over, and confiding a minor to the care and custody of another in whom a confidence and trust is imposed, and it is necessary for the person accepting the trust to do so either by express assent or by necessary implication arising from tacit acquiescence in the performance of the trust. [P 34 C 2]

*** (d) Penal Code (1860), S. 361 —Mere relationship of master and servant does not constitute master lawful guardian of servant nor is he person lawfully entrusted with care and custody.**

The mere relationship per se of master and servant does not constitute a master, within the provision of S. 361, the lawful guardian of a minor servant in his employment, nor can such master of such minor in the absence of proper proof be deemed to be a person lawfully entrusted with the care or custody of such minor. [P 35 C 1]

(e) Interpretation of Statutes— Penal and Taxing statutes must be construed strictly and not against subject.

Penal Statutes and Taxing Statutes must be construed strictly and in aid of the subject and not against him. [P 32 C 2]

In construing a Criminal Statute the words used must be construed in their ordinary, grammatical and natural sense, and not in a forced or artificial sense, unless such construction would give rise to an obvious absurdity which could not have been intended. [P 34 C 1]

(f) Criminal Trial—Burden of proof is on Crown.

In a criminal trial the onus is upon the Crown to prove by the best evidence procurable the guilt of the accused. [P 29 C 2]

(g) Criminal Trial—Charge —Sessions Judge should be precise in framing charges.

It is the bounden duty of Sessions Judge in framing charges to be precise in their scope and particular in their details. [P 30 C 1]

Khurshed Husnain —for Petitioners.

Sultan Ahmed—for the Crown.

Atkinson, J.—This appeal now comes before this Full Bench on a reference made by the Chief Justice at the request of my learned brother, Manuk, J., and myself on 14th November 1918. Five persons were originally accused of offences under Ss. 363, 366 and 368, I. P. C. Two of these persons have been acquitted, viz., Syed Sultan and Mt. Idan. The charges preferred against all the accused were, under the Indian Penal Code, committed within the provisions of the sec-

tions, dealing with kidnapping and abduction, and wrongfully concealing a person so kidnapped or abducted. Harihar was charged under Ss. 363 and 366 with abducting and kidnapping a young girl by the name of Masudia with the intent specifically alleged in the charges; and Mt. Kesar and Jasoda were charged under S. 368 with wrongfully concealing that girl, knowing that she had been kidnapped and abducted. Harihar was convicted by the learned Sessions Judge of Muzafferpur and was sentenced to a period of five years' rigorous imprisonment. The learned Sessions Judge convicted Harihar under Ss. 363 and 366, but he awarded the punishment of five years' rigorous imprisonment in respect of the offence constituted by S. 366. The learned Sessions Judge also found Mt. Kesar and Jasoda both guilty under S. 368 and awarded Jasoda three years' rigorous imprisonment and Kesar five years' rigorous imprisonment.

The case for the prosecution shortly stated is, that the girl Masudia was abducted from the house of one Chhote Begum, who resides at Muzafferpur, in the month of December 1917. It is alleged that the accused Harihar and his wife Mt. Idan enticed the girl away from the house of Chhote Begum, and that Harihar took her away to Calcutta and that his object and intent in taking or enticing the girl Masudia from the house of Chhote Begum was to force her to marry against her will, or forcibly to compel her to adopt a life of immoral intercourse with others. The girl went to Calcutta and was kept in the house of divers persons there for some three months. Masudia, in fact, resided with Mt. Kesar and Mt. Jasoda and lived for a period of three weeks with Syed Sultan as his mistress. Ibrahim, who figures in this case, is the husband of one Mt. Kesar, and Masudia had lived in Kesar's house for some time prior to the month of March. For some cause, which has not been fully explained, Ibrahim conveyed information to the police in the month of March 1918 that Masudia had been abducted and kidnapped from Muzafferpur, and brought to Calcutta for the purposes of prostitution, and that she was then (at the time the information was given) being kept by Syed Sultan and was living with him as his mistress. This information, con-

veyed to the police in Calcutta. caused the police to make certain inquiries with the result that Masudia was interviewed by the police and made a statement to them in Calcutta. She was then taken to Muzafferpur where she made a further statement, which statement was treated as the first information in this case. The prosecution was accordingly instituted in Muzafferpur and was tried by the learned Sessions Judge, as I have said, who found three out of the five accused, originally charged, guilty. Before us it has been contended by way of preliminary objection to the maintainability of the prosecution that under the circumstances of the case it was not competent for the learned Judge, in point of law, to convict any of the accused under the several sections under which they were specifically charged; inasmuch as there was no kidnapping or abducting of the complainant Masudia from her lawful guardian within the true meaning and interpretation of S. 361, I. P. C.

My learned brother Manuk, J., and I thought the matter of such importance when it came before us, sitting as a Criminal Division Bench of this High Court, that we desired to have the matter referred for the consideration of a Full Court. This Court has therefore been constituted by the Chief Justice for the purpose of determining whether in point of law Chhote Begum was in fact or in law the lawful guardian of Masudia, and whether upon the evidence it was open to the learned Sessions Judge to infer as a question of law the conclusion of fact that Mt. Chhote Begum was the lawful guardian of the minor Masudia. Before considering the main questions of law arising for our determination, I desire to pause here to deal with certain matters connected with the procedure of the prosecution, which appear to us of great importance. When the Calcutta police interviewed Masudia in March 1918, and had taken from her a statement, they immediately telegraphed to Chhote Begum in Muzafferpur, designedly for the purpose of ascertaining if she claimed to be the lawful guardian of Masudia and wished to prosecute for the alleged abduction of the girl. An answer was given to that telegram, and neither that telegram nor the reply given thereto have been produced. The Calcutta police admittedly received an answer to

the telegram that was sent by them; and the Calcutta police witness, who was called by the Crown, by a process of shifting and evasion, was unable to state the contents of the telegram that was sent by them; or the terms of the answer that was contained in the wire sent by Chhote Begum to the Calcutta police in response to their wire. Neither of these wires have been produced. In our opinion it was the clear and bounden duty of the Crown to produce the wire originally sent and the answer given thereto; and the Crown's failure to produce either of these telegrams stamps the Crown's case ab initio with grave suspicion as to its honesty and bona fides.

The onus was undoubtedly upon the Crown to establish as a fact the taking and enticing away of the alleged minor from the keeping of her lawful guardian. Therefore, it was the imperative duty of the Crown to have put Chhote Begum in the box, or to have proved facts which would have irresistibly led to the conclusion that Chhote Begum was the lawful guardian of the alleged minor Masudia. The nonproduction of Chhote Begum in this case has not been adequately accounted for in any way whatsoever. She was within easy reach for production as a witness; and she was not produced; and the nonproduction of Chhote Begum, coupled with apparently the deliberate suppression of her wire to the Calcutta police, leads us to believe that something underhand has been resorted to for the purpose of endeavouring to procure the conviction of the accused; and that material facts, essential to the prosecution, are wanting in proof to establish the guilt of the accused. I see no reason at all, nor has any valid reason been assigned, as to why Chhote Begum was not produced in Court as a witness. She was at the date of the prosecution in Chapra; and her attendance as a witness could have been easily procured. The onus was upon the Crown to prove that she was the lawful guardian of the girl; and that Masudia was abducted from her guardianship. It is a well-established principle that the onus is upon the Crown to prove by the best evidence procurable the guilt of the accused. In this case the Crown have not discharged or satisfied this legal duty. The Crown

were afraid, for some unexplained reason to call the proper person in this case to prove the essential fact as to the guardianship of Masudia. The suppression of the telegrams is a noticeable feature in this case, coupled, as it now is, with the nonproduction of Chhote Begum; because we think we may fairly draw the inference that in the reply wire which Chhote Begum sent to the Calcutta police she denied so far as she was concerned that she was in any sense the lawful guardian of Masudia.

Another matter with regard to the procedure requires to be considered; and that is the frame and form in which the charges have been drawn up. The charges have all been drawn up in a very haphazard and a very unsatisfactory way. The charges under S. 366 against Harihar and Mt. Idan do not specify that the kidnapping of Masudia was from anybody's custody. ~~They broadly alleged that on a day undefined at a time not specified, Masudia was kidnapped and abducted, with intent that she should be forced or induced to marry or to indulge in illicit intercourse. Likewise, also, the charge under S. 368:~~

"that you wrongfully concealed the girl Masudia knowing that she had been kidnapped or abducted."

In the charge under S. 363 for the first time mention is made of the lawful guardianship of Chhote Begum. Now these charges are not drawn up with that definiteness and accuracy and precision which the law requires and expects; and it would appear to us to be the bounden duty of the Assistant Sessions Judge in framing charges to be precise in their "scope and particular in their" details. However the charges as drafted are not so imperfect as to render them misleading, nor have the accused been prejudiced thereby. Nevertheless, the draftsmanship is faulty, and the charges lack precision and conciseness. I now pass to deal with the specific point raised by Mr. Kurshed Husnain on behalf of the accused as a preliminary objection to the maintainability of the convictions, viz., that Chhote Begum was not in law or fact the lawful guardian of the girl Masudia. The only evidence on the record that Masudia was a minor under the care and custody of Chhote Begum as her lawful guardian is the evidence of the three following persons;

Masudia, her sister Maglania P. W. No. 19, and the Karpardaz of Chhote Begum Nazir Hosain, P. W. No. 20. The calling of the Karpardaz of Chhote Begum to endeavour to give indirectly and in secondary manner evidence which directly, and with greater propriety, could have been given by Chhote Begum is remarkable. The Karpardaz could only give a second hand version, at best, of what he knew of his mistress and the relationship in which she stood to Masudia. Chhote Begum was the person to have disclosed such facts as the Crown ought to have relied upon to establish proof of Chhote Begum's guardianship of the infant Masudia. What is the evidence which the three persons mentioned above give with reference to the question of guardianship? The evidence of Masudia is very imperfect and unsatisfactory. She only says: "I was brought up and maintained by Chhote Begum" She says no more. What does her sister Maglania say? Her evidence is to be found at page 62 of the paper book.

Her evidence is equally imperfect and unsatisfactory; Maglania says that she knew nothing about her sister and the relationship in which she stood towards Chhote Begum. She says that she left Chhote Begum's house many years ago, and went to the house of another person: where she remained for some years, and that subsequently she married. She practically ceased to take any interest in her sister, and she confesses that she was wholly ignorant of her sister's condition of life or how she lived. She admits that her sister ran away from Chhote Begum's house on more than one occasion; and that while in the service of Chhote Begum, she probably received twelve annas per month as wages in respect of the services which she rendered to Chhote Begum; and she adds that Chhote Begum had "no control over her," that is, Masudia. Obviously P. W. 19 knows very little of the facts which governed the relationship which existed between Chhote Begum and Masudia. It would appear generally from the evidence that the mother of Masudia was originally a servant in the employment of Chhote Begum; that she died in her service in or about the year 1890, when Masudia was an infant 1½ years old, and that at that time the maternal aunt of these girls, Masudia and

Maglania, was also in the service of Chhote Begum.

After P. W. 19 left Chhote Begum's service her aunt maintained Masudia up till the date of her death, which occurred within recent times. In the acts of kindness and charity shown by Chhote Begum towards Masudia and her sister Maglania, there is nothing to suggest a care or custody in the nature of a lawful guardianship by Chhote Begum over Masudia or her sister. No doubt Chhote Begum occupies a high position and is in affluent circumstances, and her bounty has been exercised on diverse occasions in favour of these two girls, Masudia and Maglania but from these facts per se nothing can be fairly inferred which would justify an inference of facts that Chhote Begum was the lawful guardian of Masudia or her sister. Chhote Begum, no doubt, helped Maglania at the time of her marriage; but when Maglania ran away from her house, she made no effort to get her back; and likewise when Masudia ran away she made no endeavour to induce her to return. In addition to the evidence given by Masudia and her sister there is the evidence of the Karpardaz of this lady, Chhote Begum, who, as I have already said, was called for the purpose of endeavouring to circumvent the difficulty that was created by the nonproduction of Chhote Begum herself. A practice of circumvention of this nature is not to be encouraged in a public prosecution at the instance of the Crown. This Karpardaz Nazir Hussain really in his direct examination gives no evidence upon which any Court would be warranted in holding that Chhote Begum was the legal guardian of Masudia. He says that Masudia used to live in Chhote Begum's house; her mother was a maidservant there. He adds, the mother of the girl died when she was only 1½ years of age, since then, she has been maintained and looked after by Chhote Begum. This is the sum total of his evidence on direct examination. In cross-examination however he is more precise and definite as to the nature of the relationship that existed between Chhote Begum and Masudia. He says:

"Her aunt was also a maidservant of Chhote Begum. Maglania, the elder sister of Masudia, ran away from Chhote Begum's place while her aunt was serving there. The aunt of the girl maintained Masudia as well as her elder sister after the death of their mother. The aunt used

to pay for their food. They used to get one rupee pay and food." "Masudia's aunt left service sometime after Maglania ran away. Chhote Begum never tried to have the girl caught and restored to her."

And later on the same witness also says:

"The complainant was never adopted by Chhote Begum and Chhote Begum never treated her as a relative. She lived with her as a maidservant. She has as much control over her as a master has over a servant. Complainant ran away twice or thrice before. She lived in different places when she ran away. Chhote Begum never searched for her. Probably the girl used to receive pay of twelve annas a month from the time she ran away for the third time."

And then this witness adds in the concluding part of his cross-examination a suggestion tending to show that Masudia was living an immoral life. He says: "Generally the girl used to remain absent at night for the last two years." "I saw the girl in company of Bakar several times." This is the entire evidence on which we are asked to arrive at the conclusion of fact that Chhote Begum was the lawful guardian of Masudia, or a person lawfully entrusted with her care and custody. Mr. Khurshed Husnain contends that in this case there is no question of guardianship at all; that at best the relationship existing between Chhote Begum and Masudia is that of mistress and maid, master and servant; and that a master is not in point of law a trustee or the lawful guardian of his minor servant. This brings me to a consideration of the interpretation or construction of S. 361, I. P. C., and we desire to add we have received much assistance from the arguments addressed to us by the Government Advocate and Mr. Khurshed Husnain respectively. S. 361, I. P. C., defines what constitutes, according to the Indian Penal Code, the offence of kidnapping or abduction, viz. the taking or enticing away of a minor, out of the keeping of the lawful guardian of such minor without such guardian's consent, a male under 14 years and girl under 16 years. If no addition was superadded to the main portion of the section, the offences, constituted by Ss. 362 to 369, inclusive, would be limited to kidnapping or abducting a minor from the keeping of its lawful guardian, viz. the natural or legal guardian of a minor. Clearly the intention of the legislature was, by virtue of the explanation appended to S. 361, to extend the application of lawful guardian so as to include and

embrace within the accepted meaning of this legal term, "a person lawfully entrusted with the care or custody of a minor." The explanation to S. 361, runs as follows:

"The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor."

I take this explanation to mean, and only to mean this and no more than this; that the accepted and general meaning of the term "lawful guardian" is to be extended so as to include within its terms a person lawfully entrusted with the care or custody of a minor, as if a lawful guardian. In my opinion the section and the explanation appended thereto are express and exhaustive in their terms; and that to constitute the offence of kidnapping or abduction there must be in fact duly, properly and legally proved a taking or enticing away of a minor from the custody of the following persons: (a) the natural guardian; (b) the legal guardian, if the natural guardian be dead, or (c) a person lawfully entrusted with the care and custody of a minor. Class (c), enumerated above, we think covers all persons, other than the legal and natural guardians, who, for the time being, may be lawfully entrusted with the care and custody of a minor; such as a schoolmaster, or a friend at whose house a minor may be staying on a long visit or such like persons standing in a similar degree of relationship. The learned Government Advocate contends that neither S. 361 nor the explanation thereto is exhaustive as to the category of persons from whose custody a minor may be kidnapped or abducted, and that the section and explanation apply to all persons who may have acquired physical possession of a minor, for its custody and care, so long as the acquisition of such custody by the alleged guardian or custodian is not ab initio unlawful in the sense that it is illegal, improper or contrary to law.

The learned Judge who tried this case seems to have adopted this view of the law; and with the legal decision expressed by the learned Sessions Judge, in this aspect of the case, we entirely disagree for the reasons which appear later in the course of our judgment. I find no warrant or authority to support the contention advanced by the learned Government Advocate. Certainly there is nothing in S. 361, or its explanation,

which would justify so wide an interpretation of the words used and employed in the section itself by the framers of the Indian Penal Code. The learned Government Advocate has cited no Indian decision to support the argument he asks us to accept. May I say with respect that the learned Government Advocate has based his argument on English authorities founded on an enactment wholly and essentially different to the provisions contained in the Penal Code? The English statute is broader and wider and more general in its terms than S. 361 I. P. C. If this case depended for its decision upon the English Act of Parliament as interpreted by the Courts of law in England, no doubt the learned Government Advocate's argument would be well founded.

But between the English statute and the Penal Code there is a fundamental, radical, and essential difference; and the difference consists in this, that the English Act differs from S. 361, I. P. C. in its phraseology and scope as much as night differs from day. We have to construe, as interpreters of law, the Penal Code as we find it. It is not within our province, or our duty as Judges to make laws. We have only to interpret the law as given to us by the legislature of this country; and by its enactments we must be guided and controlled. If the law is not wide or general enough to cope with a gross evil then it is within the province, and I would add the bounden duty, of those who make the laws to be administered in this country to amend the existing law so that the evil aimed at may be constituted a crime and become punishable under the law. Speaking for myself I decline to incorporate, for the purpose of construing a penal statute, words not to be found in the enactment itself; to do so would be subversive of the accepted legal principle laid down by a host of unimpeachable authorities as a canon of construction that penal statutes and taxing statutes must be construed strictly; and in aid of the subject and not against him.

The learned Government Advocate admits that if the first branch of his argument fails then S. 361, I. P. C., has a limited and restricted application; and that in fact it only applies to the three classes of persons who, I have already mentioned, can constitute or come within the

accepted meaning of the term "lawful guardian." However to this argument the learned Government Advocate adds a corollary which depends for its validity upon the true construction and interpretation of the explanation to S. 361. This argument of the learned Government Advocate depends upon the true meaning of the words "lawfully entrusted" as embodied in the explanation to S. 361, which includes within the meaning of lawful guardian a person not otherwise within it. The learned Government Advocate contends that a minor may be "lawfully entrusted" to the care or custody of another either by an express declaration of trust; or that the Court may infer or presume from certain facts proved such an antecedent declaration of the entrusting of the care and custody of a minor to some one else other than the legal or natural guardian of such minor. In other words, that the "lawfully entrusting" of a minor to the care and custody of another may be express or implied. No case has been cited to support this contention, save a case reported as *Fatti v. Emperor* (1), and with the authority of that decision I utterly and entirely disagree. I refuse to follow it; and in my opinion it is an authority for no proposition of law, and is inconsistent and illogical in its reasoning and contradictory of itself.

Thus in the sequence of events we must now consider what is the true interpretation of the words "lawfully entrusted" as used in the explanation to S. 361, I. P. C. "Lawfully" means that which is opposed to unlawful, viz., legal, proper, right, without fraud, pressure or constraint. I do not think that the word "lawful" necessarily means that the person who entrusts a minor to the care or custody of another must stand in the position of a person owing a legal duty or obligation to the minor. It is a sufficient compliance with the section and its explanation if the entrusting of the minor to the care or custody of another is effected without illegality or the commission of any unlawful act by a person legally competent to do so. In my opinion the ratio decidendi of the cases cited and reported as *Raja Baikunto Nath Dey Bahadur v. Uday Chand Maity* (2) and *Gordhanlal v.*

Darbar Shri Surajmalji (3) do not assist as a guide; nor do they afford a general principle applicable to the construction of the section of the Penal Code requiring our determination. The cases cited were decided with reference to the interpretation of S. 70, Contract Act; to which different considerations would apply when compared with an enactment like the Penal Code.

What then is the meaning and interpretation to be given to the word "entrusted" as used in the explanation. In construing a Criminal Statute I take it to be a guiding rule of law, as to the construction of statutes, that you must construe the words used in their ordinary grammatical and natural sense, and not in a forced and artificial sense; unless such conclusion would give rise to an obvious absurdity which could never have been intended: *Vacher & Sons Ltd. v. London Society of Compositors* (4). I give to the word "entrusted" therefore its primary, ordinary, grammatical and natural meaning. "Entrust" means the giving, handing over or confiding of something by one person to another. It involves the idea of active power and motive by the person reposing the confidence towards the person in whom the confidence is reposed. The learned Government Advocate admits that if his first argument fails, then to have an entrustment or an entrusting contemplated by the explanation to S. 361 there must be necessarily three persons to the act of entrusting, viz., (1) the person imposing the confidence or trust, (2) the person in whom the confidence and trust is imposed, the person or thing constituting the subject-matter of the trust. With that view I agree, and I think it may be logically inferred therefrom that what the law contemplates by the explanation to S. 361 is a declaration of trust, by one competent, to make such a declaration, conveying handing over, and confiding a minor to the care and custody of another in whom a confidence and trust is imposed; and in my opinion, it is necessary for the person accepting the trust to do so either by express assent or by necessary implication arising from tacit acquiescence in the performance of the trust.

(1) [1911] 7 P. R. 1911 Cr. = 10 I. C. 97

(2) [1906] 2 C. L. J. 311.

(3) [1902] 26 Bom. 504.

(4) [1913] A. C. 107.

Therefore "lawfully entrusted" means a declaration of trust, and the handing over or the giving or confiding of a minor to the care and custody of another by a person competent to do so unaffected by any illegality or impropriety coupled with the assent, express or implied, of the person in whom the trust is vested or imposed. Neither the declaration of trust itself, nor its acceptance need be necessarily in writing; it is sufficient if the declaration is verbally made and given; or if it arises from a course of conduct consistent only with the existence of such an antecedent declaration; and accepted verbally or by necessary implication arising from the conduct of the party so entrusted with the duty imposed: *Empress v. Pemantle* (5) and *Emperor v. Jetha Nathoo* (6). These authorities lay down that in construing the term "lawful guardian" as used in the body of S. 361 the Courts ought to give these words a liberal construction. I agree with that exposition of the law and I gather that the ratio decidendi of these decisions is founded on the express phraseology of the explanation itself, viz., that the inclusion of persons within the term lawful guardian, who are not so in law, tends to show that the words "lawful guardian" as employed in the body of S. 361 must not receive their strict legal interpretation.

The learned Government Advocate further contends that cases may arise where it is impossible to establish by legal proof even a verbal declaration constituting a guardianship of a minor by another, other than its legal and natural guardian, and he contends that in such cases the Courts may infer, from certain facts proved the inference that at some antecedent time undefined, by some person probably unknown a declaration was made constituting some person a guardian of a minor. Subject to what I have already said, I am not aware of any principle of law which permits a Court of Justice to relax the construction of a Criminal Statute in a manner so at variance with its express provisions and phraseology and which might operate unfairly to the prejudice of an accused person, and leave to the region of inference from uncertain facts the right of Courts to infer a fact which the law appears to me to require

to be established by substantive and concrete proof. Such a method of construing a Criminal Statute is a dangerous innovation; and, in my opinion, ought not to be encouraged. Mr. Gour in his treatise on the Indian Penal Code and in his commentary on S. 361 says that that section has no application to a "self-constituted" guardian, nor to persons such as waifs or strays who are taken up and maintained by charitable institutes (Gour's Penal Law, p. 1406). With that expression of opinion I agree. No doubt the civil law in its wisdom in the administration of the law founded on equity and good conscience does imply and construct a trust or trusts to avoid injustice, wrong doing, and fraud. In my opinion however such principle is inapplicable to the construction of a Criminal Statute.

I hold that no Court ought in the administration of criminal justice to dispense with the statutory requirements of the law as to the proof necessary to establish a concrete fact; leaving such fact to be inferred as an inference from facts which may be uncertain and unreliable in themselves. If it may be inferred as a fact that a person has been appointed a guardian of a minor, at some time unknown, by some person unknown, then such a guardian must be deemed to be the lawful and legal guardian of such minor in the full legal acceptation of the term for all time so long as the minority continues. Courts of Law ought not lightly to infer that a person is a lawful guardian for one purpose only, and not for all purposes if the obligation of guardianship is once established, whether expressly or by inference. Once guardianship is established as a fact, it involves by the guardian towards the minor legal duties, obligations and liabilities which the minor may and can enforce against the guardian. I hesitate to lay down a rule of law which would enable a Court, by mere inference only, to hold that a certain individual was at some time or other, in some unknown way appointed guardian of a minor, where such inference of fact would involve the guardian in legal liabilities and obligations never in contemplation or within the perview of the inquiry in which the inference was so made and drawn.

Applying these principles in this case, we are all satisfied that upon the facts proved no inference could or can be drawn.

(5) [1812] 8 Cal. 971.

(6) [1904] 6 Bom. L. R. 785.

which would justify us in holding that Chhote Begum was ever in fact the appointed lawful guardian of Masudia; or ever lawfully entrusted with her care and custody. No express evidence has been offered or tendered in this case to show that Masudia's mother or aunt or sister, as natural or preferential guardians, ever expressly constituted or declared Chhote Begum to be the guardian of the girl Masudia, or that a course of conduct consistent only with such a declaration existed from which such an inference could be fairly and reasonably drawn. In our opinion such proof was necessary and essential on the part of the prosecution to establish the guilt of the accused. In the absence of such proof it cannot be said that the accused kidnapped or abducted Masudia from the keeping of her lawful guardian; hence we all agree that the conviction of all the accused persons under Ss. 363, 366 and 368 must be set aside and the respective accused, if in custody, be discharged from custody. It is not necessary having regard to the view we take as to the question of guardianship to discuss the other matters urged by Mr. Khurshed Hussain on behalf of the accused, viz., with regard to the enticing of the girl Masudia from the alleged lawful custody of her guardian, nor to deal with the point urged as to the age of the girl Masudia.

However we may add for the legal guidance of the Subordinate Courts of this province that the mere relationship per se of master and servant does not constitute a master within the provision of S. 361, I. P. C. the lawful guardian of a minor servant in his employment nor can such master of such minor, in the absence of the standard proof which we have laid down as being necessary be deemed to be a person lawfully entrusted with the care and custody of such minor.

Coutts, J.—I entirely agree with my learned brother. I wish merely to remark that even accepting the prosecution case it is as consistent with the relationship of master and servant as with the relationship of lawful guardian between Chhote Begum and Masudia. In such a case and in all cases in which the Court is asked to imply lawful guardianship from the conduct of the parties such conduct must be shown to be inconsistent with any other relationship.

Manuk, J.—I also agree generally with the exhaustive judgment of my learned brother Atkinson, J., and have only a few observations to make on my own behalf. In my opinion it was the duty of the Crown to affirmatively prove not only that Chhote Begum was the lawful guardian of Mt. Masudia within the meaning of the explanation as has been observed in the judgment just delivered but also that any taking or enticing of Masudia that may have taken place was without Chhote Begum's consent. This has in fact been admitted by the learned Government Advocate, who has asked us to find the absence of this consent on the evidence of her Karpardaz. It is sufficient to say that I agree with my brother Atkinson as to the value of that evidence, in the absence of Chhote Begum herself on any matters touching her relationship to the girl Masudia. The words "lawful guardian" in the substantive portion of the section would include in my opinion only persons legally entitled to be guardians, i. e., those entitled by the operation of statute or judicial appointment and those who are her natural guardians. The explanation creates another class of lawful guardian for the purposes of S. 361 and its cognate sections, i. e., it extends the meaning the Courts would otherwise have placed on the words "lawful guardian" to such further class, but to no others than the words of the explanation would in their natural and proper meaning include. Such a person is not in my opinion a "lawful guardian" as ordinarily known to the civil law. He has been sometimes styled a *de facto* guardian to distinguish him from a complete guardian *de jure* and I conceive that all the duties responsibilities and liabilities which attach to the latter would not apply to him more particularly under the Mahomedan and Hindu systems of Law. In the interpretation of the explanation, however no analogy can properly be drawn from the English cases. As several were cited I desire to emphasize the difference between the English and the Indian law on this subject. The case of *Reg v. Olifier* (7), to which we were referred by the learned Government Advocate was decided on an indictment under 24 & 25 Vic, C. 100, S. 55, which runs as follows:

(7) [1866] 10 Cox. C. C. 402.

"Whoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her shall be guilty of a misdemeanour."

In the case of *Reg v. Henkers* (8), the prisoner was indicted under the later enactment (48 & 49 Vict. C., S. 7, commonly known as the Criminal Law Amendment Act, 1885, which runs:

"Any person who takes or cause to be taken such girl out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her shall be guilty of a misdemeanour."

It will be observed that in neither of these two enactments is there any element of entrustment present or necessary. All that is required in the case of persons other than the parents is the lawful care or charge under both enactments. It is hardly necessary to point out once more that the explanation to S. 361 runs:

"The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person."

"Lawfully entrusted" cannot be construed, without doing violence to language, as equivalent to lawfully having. The result of the language used does, no doubt, place many minors beyond the protection of that section as it now stands. Conditions however have vastly altered since the section was framed and I am strongly of opinion that the Legislature may well intervene to bring the Indian law into line with the English enactment in this particular respect. However that may be, I am of opinion that even as the law now stands, such "entrustment" as the section requires may be inferred in the absence of proof of an express declaration, written or oral from a well-defined and consistent course of conduct governing the relations of the lawful guardian alleged in the indictment and of the minor. I agree also that in the absence of a declaration, the Court will require very cogent proof of such conduct from which to infer the necessary entrustment and ordinarily the Court will not infer a lawful guardianship within the terms of the explanation in the absence of any claim to that position by the person indicated by the prosecution as such lawful guardian.

V.S./R.K.

Order accordingly.

(8) [1886] 16 Cox. C. C. 257.

A. I. R. 1919 Patna 36

ROE AND COUTTS, JJ.

Sri Prabhu—Petitioner.

v.

Dwarka Prasad—Opposite Party.

Civil Revn. No. 208 of 1918, Decided on 6th January 1918, against the decision of Dist. Judge, Muzaffarpur, D/-11th June 1918.

Civil P. C. (5 of 1908), O. 3, R. 1 and O. 9, Rr. 9 and 10 — One of several plaintiffs ordered to appear in person—Dismissal of suit for default held justified.

A Court has jurisdiction to direct a plaintiff to appear in person and to dismiss his suit if he fails to do so.

In the course of a trial the defendant asserted that he wished to examine one of the three plaintiffs as a witness in the case and to rely upon his oral evidence. The Court ordered that the plaintiff should appear in person and on his failure to do so dismissed the whole suit:

Held: that the Court had jurisdiction to dismiss the suit as against the plaintiff who had been ordered to appear in person but that it had no jurisdiction to dismiss it as against the remaining plaintiffs and that to that extent its order must be set aside. [P 37 C 1]

Rajendra Prasad—for Petitioner.

Murari Prasad and *Har Narain Prasad*—for Opposite Party.

Judgment.—This is an application to set aside an order by the District Judge of Muzaffarpur, entertaining an appeal against an order of the learned Munsif dismissing a suit under O. 9, R. 12, as read with O. 9, R. 8. There were three plaintiffs to the suit. In the course of the trial the defendant asserted that he wished to examine one of them as a witness in the case and rely upon his oral evidence. Upon this the learned Munsif ordered that the plaintiff should appear in person. He failed to do so, and the suit was dismissed.

In appeal the learned District Judge pointed out that the learned Munsif's order directing the plaintiff to appear in person was not an order such as is contemplated by O. 10, R. 4, and that therefore the order made dismissing the suit was not a good order under O. 9, R. 12, and could not be supported. He further held that inasmuch as one of the plaintiffs only was directed to appear, the suit could not be dismissed as against all the plaintiffs. On the first part of this decision it is clear that the learned Judge lost sight of the provisions of O. 3, R. 1, which directs that any party may be directed to appear in person. O. 9, R. 12, clearly refers to an order made under

O. 3, R. 1, for the penalties to be incurred on failure to obey an order under O. 10, R. 4, are set forth in O. 10 itself. The learned Munsif therefore had jurisdiction to direct the plaintiff to appear in person and had also jurisdiction to dismiss his suit if he failed to do so. The order dismissing the suit against the plaintiff who was directed to appear in person could not have been rightly attacked in the District Court and indeed no appeal lay to that Court. The order however dismissing the suit as against the remaining plaintiffs was clearly made in contravention of O. 9, R. 10. The two plaintiffs who had not been directed to appear in person had signed a vakalat-nama directing their pleader to appear for them and that pleader was present on the day of hearing, and had filed on behalf of the plaintiffs a list of witnesses to be examined. Even therefore if the learned Judge had no jurisdiction to entertain an appeal against this part of the Munsif's order, we are of opinion that in so interfering he has done substantial justice and if that order had not been made we ourselves would have made it under S. 115 of the Code. We therefore see no reason to interfere with the Judge's order directing that the suit be continued on behalf of the two plaintiffs who were not ordered to appear in person but we set aside that part of the Judge's order which permits the continuation of the suit by the plaintiff who was directed to appear in person.

V.S./R.K.

*Order varied.***A. I. R. 1919 Patna 37**

ATKINSON AND COUTTS, JJ.

Trilochan Das and another — Petitioners.

v.

Jogeshwar Das and others—Opposite Parties.

Criminal Revns. Nos. 44 and 101 of 1919, Decided on 29th April 1919, against order of Deputy Magistrate, Singhbhum, D/- 12th December 1918.

Criminal P. C. (5 of 1898), Ss. 145 and 146—Proceedings under S. 145 cannot be struck off.

Where proceedings under S. 145 have once been started, the Magistrate has no jurisdiction to strike them off. He must pass an order either under S. 145 or under S. 146 of the Code.

[P 37 C 2]

S. N. Bose—for Petitioners.

A. K. Ray—for Opposite Parties.

Coutts, J.—This application arises out of a proceeding under S. 145, Criminal P. C. Proceedings were started on 22nd November on a police report and the Sub-Inspector of Bahragora was directed to attach the crop on the land, to reap it when ripe, and to secure it until further orders were passed. The date fixed for hearing was the 9th December. Both parties on 9th December applied for time and time was allowed until 12th December. On 12th December the first party alone was present and prayed for time. On this the order of the Magistrate was: "Proceeding struck off. Crop to remain in the Sub-Inspector's custody till orders in respect of it are passed by competent civil Court."

The next order of the Magistrate is dated 19th December on which date the second party filed a petition, praying for release of the attached crops. The petition was not disposed of on that date, the order of the Magistrate was that this would be done when he knew what the value of the attached crop was and when the second party deposited the money in case of proof afterwards that he was not entitled to the crops. He directed the Sub-Inspector to report on 3rd January. On 3rd January the first party prayed that the crops might be made over to him. Finally, on 27th January, the first party appeared, and the Magistrate after looking at Settlement papers ordered the crops to be made over to the first party. Against the order of 12th December and all subsequent orders applications have been filed that they should be set aside on the ground that they are illegal and have been passed without jurisdiction.

It appears to us perfectly clear that after the proceeding had been struck off and there were no proceedings before the Magistrate, he acted entirely without jurisdiction in passing orders with regard to crops which were not then the subject matter of any proceeding. In addition to this however, his order directing the proceeding to be struck off was also without jurisdiction. The proceeding was under S. 145 and it was open to the Magistrate to pass orders either under S. 145 or under S. 146. He certainly did not pass an order under S. 146, and it does not appear that he had passed an order under S. 145. The whole of the orders from and including the order passed on 12th December are without

jurisdiction, and should, in my opinion, be set aside, with a direction that the Magistrate should take up the proceeding from the point at which they were before 12th December and proceed with them in accordance with law.

Atkinson, J.—I agree.

V.S./R.K.

Orders set aside.

A. I. R. 1919 Patna 38

DAWSON-MILLER, C. J. AND COUTTS, J.

Mt. Bibi Fakhrunissa—Appellant.

v.

Rambhanjan Singh—Respondent.

Misc. Judicial Case No 20 of 1919, Decided on 7th February 1919, from decision of Dist. Judge, Gaya, D/- 19th August 1918.

(a) **Limitation Act (1908), S. 12—Application for copies made on 21st August — On 26th applicant was notified of requisite number of stamped folios—Folios supplied partly on 27th and partly on 30th — Applicant is not entitled to deduct period from 27th August to 30th.**

The time requisite for obtaining copies of the judgment and decree to be appealed against under S. 12 is computed from the date of the application for copies to the date when they are ready for delivery to the applicant provided the period so calculated is not prolonged by any fault on the part of the applicant. An applicant for copies should deposit the required number of folios and stamps not later than the first day on which the office is open after that on which the number of folios and stamps is notified to him and if he neglects to do so he is not entitled to deduct the intervening days between the notification and the supply of stamped folios. [P 38 C 2]

Appellant applied for copies of the judgment and decree of the lower appellate Court on the 21st August and on the 26th he was notified of the requisite number of stamped folios, which were supplied partly on the 27th and partly on the 30th:

Held, that the appellant was not entitled to deduct the period from the 27th August to the 30th from the period of limitation fixed for filing the appeal under S. 12, Limitation Act.

[P 39 C 1]

(b) **Limitation Act (1908), S. 5 — Honest advice of legal adviser on untrue statement of facts is not sufficient cause.**

An honest and bona fide advice of a legal adviser given upon an untrue statement of facts is not a sufficient cause, within the meaning of S. 5, for the extension of the period limited for the filing of an appeal. [P 39 C 2, P 42 C 1]

Khurshed Hasnain—for Appellant.

Kulwant Sahai—for Respondent.

Dawson-Miller, C. J.—On 2nd December 1918 the petitioner filed a memorandum of appeal from a judgment of the District Judge of Gaya, dated 19th August 1918. On 21st August she applied for copies of the judgment and decree which were necessary for filing with the memorandum of

appeal. The decree was signed on 26th August 1918 and on the same day the appellant was notified of the requisite number of folios and stamps, as appears from the endorsement on the copy of the judgment as well as on the copy of the decree eventually supplied. The same documents show that the appellant delivered the requisite number of stamps and folios partly on 27th August and partly on the 30th. On 2nd September the copies were ready for delivery, and on the 3rd they were made over to the applicant. Now counting from 27th August, the day after the decree was signed, the 90 days, which is the time allowed for filing the memorandum of appeal, would expire on 24th November. The appellant however is entitled by S. 12, Limitation Act, to exclude from the computation of 90 days the time requisite for obtaining copies of the judgment and decree. This time is computed from the date of the application for copies to the date when they are ready for delivery to the applicant provided the period so calculated is not prolonged by any fault on the part of the applicant. According to the practice in this Court, which was laid down by the Full Bench in the case of *Ram Asray Singh v. Sheonandan Singh* (1), the applicant for copies should deposit the required number of folios and stamps not later than the first day on which the office is open after that on which the number of folios and stamps is notified to him and if he neglects to do so, he is not entitled to deduct the intervening days between the notification and the supply of stamped folios. The reason for this is that the copying does not begin until the requisite number of folios is supplied; and if there is delay in beginning the copying due to the neglect of the applicant, it is only just that he should not be entitled to take advantage of his own delay.

The General Rules and Circular Orders provide in Ch. 4 that the applicant shall be informed that his application will not be considered complete and that the preparation of the copy will not be commenced until he has supplied in full the court-fee stamps and the number of folios stated to be required. The form on which applications of this nature are made contains in the middle portion of a form upon which, on pre-

(1) [1917] 1 P. L. J. 573=35 I. C. 868.

sentation at the office and after looking at the document the copy of which is required, the number of stamped sheets of the value of 3 annas, 6 annas or 9 annas, as the case may be, and also the court-fee stamps for a certified copy, extra stamps for urgency and also court-fee stamps for service is entered by the clerk and that having been done the lower portion of the form, which contains a receipt, is signed by the officer of the Court showing that the application has been received. This form of receipt is torn off and handed back to the applicant and it contains a notice printed in the vernacular that the application will not be considered complete and the preparation of the copy will not be begun until the stamps and folios necessary have been supplied in full. One must presume, unless the contrary is shown, which does not appear in this case, that that form of receipt with that notice printed upon it was handed back to the person who made the application for copies of the documents on the occasion in question and that was clearly a compliance with the provisions of R. 14, Ch. 4, Vol. 1, of the General Rules and Circular Orders. Before I pass on I should like to draw attention to R. 16 of the same chapter because that provides a direction to the office that the number of folios required should be carefully calculated so as to obviate the necessity of obtaining additional folios from the applicant, a contingency which under a proper system ought never to arise.

The question which we have to determine in this case is, how many days between the 27th August and the 2nd September, that is to say, the date of the delivery of some of the stamps and folios and the date when documents were ready can be deducted by the applicant. The whole period is seven days. If these are deducted, the limitation period would expire seven days after the 24th November, that is on 1st December, which last year happened to fall on a Sunday. The memorandum was filed on Monday the 2nd December and was therefore in time, if these seven days are deducted; but as the number of folios and stamps required were not fully supplied until the 30th August, the appellant is not entitled to deduct the days between the 27th and the 30th August unless she can show that she was not responsible for

the delay. Four days, that is from the 30th August to the 2nd September, she is clearly entitled to deduct and this would extend the limitation period up to the 29th November, but that is not sufficient to bring the appeal within the limitation period. The appellant's case is that the delay was not occasioned by any fault of her own and secondly that her karpardaz arrived at Patna on the 27th November and was advised by Mr. Khurshed Husnain, her vakil, that the period of limitation for filing the memorandum of appeal would expire on the 2nd December, otherwise that it could have been prepared and filed by the 28th November and therefore we are asked to extend the period under S. 5 Lim. Act, upon the ground that a genuine mistake was made based upon an opinion given by the applicant's legal adviser which opinion was an honest and bona fide opinion.

Two affidavits have been filed one by the karpardaz of the appellant verifying the petition, the other in the form of a counter-petition verified by affidavit of the respondent's karpardaz asking that the application be dismissed. The former states that the appellant's karpardaz on application was informed by the officers of the Copying Department that a certain number of folios, which he does not remember exactly but which was between 20 and 30, would be required, that to the best of his knowledge he deposited the number required on the 27th August and was not informed that the application was incomplete or that the preparation of the copy would not commence. He adds the copying work did commence immediately. How he knew that it is very difficult to say. He then goes on that to the best of his knowledge the office demanded three more folios on the 30th August which demand was duly complied with, and when he took delivery of the copies one folio out of those deposited was returned to him. He arrived at Patna, according to the petition, on the 27th November and was advised by the learned vakil that the time for filing his memorandum of appeal expired on the 2nd December. The rest of the petition is not very material, but it states that the memorandum was ready and the stamp purchased on the 29th November and that it was filed on the 2nd December, the office being closed for the two intervening days. I think it must be

taken, as appears from the endorsement on the copy of the judgment as well as on the decree filed, that the appellant was notified of the requisite number of folios and stamps for the judgment and decree on the date there mentioned, which is in each case the 26th August 1918, and not partly on that date and partly on the 30th, unless we are satisfied by reliable evidence that the endorsement is inaccurate.

Now I have referred to those rules in the General Rules and Circular Orders which seem to me to have a bearing upon this matter, and I think that having regard to R. 16 in Chap. 4, it is very unlikely that in a simple case of this sort any mistake would be made by the office in calculating the number of folios and stamps required, and further I think that if the full numbers were not demanded on the 26th, we should have found in the column which gives the date when the requisite number was notified to the applicant not merely the 26th August but the 26th and some other date, if it were the fact that the requisite number was not notified on the same day but only a portion, just as we find in the next column that the date of delivery of the requisite stamps was not on one day but on two. On referring to the petition which is verified by affidavit, it will be seen that the statements made therein are said to be to the best of the knowledge of the petitioner's karpardaz. He does not commit himself definitely but only deposes to the best of his knowledge, which in other words means to the best of his recollection. Although he is uncertain as to the exact number of folios required, he does pledge himself definitely apparently that it was somewhere between 20 and 30 and to the best of his knowledge again these were deposited on the 27th August. He swears therefore that to the best of his knowledge between 20 and 30 folios, and that means of course also the requisite stamps were deposited on the 27th August, and then again that the office to the best of his recollection demanded 3 more on the 30th, which he supplied and eventually got one back. Now the copy of the record in the register from which these endorsements are taken has been put in and that corroborates the endorsement on the back of the copies of the documents to this extent, that it

shows the date of notifying the requisite number of folios and stamps was 26th August and not partly on that day and partly on some other. It also shows the number of folios filed together with the date of filing and it shows that 22 folios of 3 annas, that is to say, each having a 3 anna stamp on it, were filed on 27th August and that 3 more with a 3 anna stamp on them were filed on 30th August, that is, 25 altogether and it also shows that 24 were used and one was handed back to the applicant.

In considering this affidavit one has got to ask oneself, first of all, what it really means and secondly how far it can be accepted if there is anything to contradict it, and I cannot help feeling that the manner in which this affidavit has been worded is to avoid committing the deponent to any definite statement because throughout we find that the information there set out is always said to be to the best of the knowledge of the petitioner's karpardaz, and it does not seem to me that is sufficient to contradict the information which we have from the endorsements on the documents themselves, where it is definitely stated that the requisite number of folios and stamps was notified on 26th August. That clearly means, not that a portion of the requisite number was notified on that date, but that the whole number required and eventually supplied was notified to the applicant upon the 26th. It is not disputed that the whole number required was not supplied on 27th August. It is admitted that a portion of the requisite number was supplied 3 days later, and it is undoubtedly the practice of the office not to start the work till the requisite number of stamps and folios has been supplied. No doubt the reason for that is that the applicant has a week after notification in which to supply the requisite number of stamps and folios and if he does not do so by the end of that week, his application is treated as nonexistent and it will have to be renewed if he wants the documents asked for, but if he fails within a week to supply the required number of stamps and folios although his application is treated as not having been made he is nevertheless entitled to get back those stamps and folios, if any, which he has already deposited and therefore clearly the office would not begin to copy the documents without having the

requisite number of stamps and folios provided. In the first place, the whole work may turn out to be unnecessary and in the second place, the applicant would be entitled, if he had not supplied the full number, to get back the stamps and folios which he had in fact deposited.

Further in the affidavit there is a statement to the effect that to the best of the knowledge of the karpardaz he was not informed that the application was incomplete or that the preparation of the copy could not be commenced. If that is an attempt to make out that some information or some notification which the office ought to have conveyed to him was not in fact conveyed, I think that it entirely fails in its object because there is no obligation upon anybody in the office, when a portion of the requisite number of stamps and folios is supplied, to inform the applicant depositing the stamps and folios that the work will not commence until the full number of court-fee stamps and folios has been deposited. The obligation upon the office is at an earlier date when the application is presented and when the applicant is informed of the number of stamps and folios which will be required. It is then that the receipt is torn off the form with the notice on it and presented to the applicant and from that time, if he takes the trouble to read the notice, he has all the notice he is entitled to have under R. 14, Ch. 4, of the General Rules and Circular Orders.

However, the matter does not rest there because there is an affidavit on behalf of the respondents in this case stating that their karpardaz after receipt of notice of the present application enquired in the office of the Copying Department in the lower Court and was informed that the original notification made to the appellant on 26th August was to supply 25 folios and that it was due to the gross negligence of the appellant's karpardaz, that the requisite number of folios was not filed and only 22 folios were filed on 27th August. It goes on to say that the respondent's karpardaz was also supplied with copies of the judgment and decree on 8th January 1919 and that 25 folios were notified by the copying department to him, and one of them was eventually returned. Now it is quite clear in looking at the certified copy of the register which has been produced

from the office in question that 22 folios of 3 annas stamps were in fact supplied on 27th August and the remaining 3 on 30th, so that to that extent there is some corroboration of the respondent's affidavit and I cannot help feeling in this case that the appellant has entirely failed to satisfy the Court, by any evidence which can be accepted, that she did in fact comply with her obligation in supplying the requisite number of stamps which she was notified would be required before the copying could commence.

It is impossible to my mind on an affidavit such as this, contradicted as it is by the affidavit of the respondent, to come to the conclusion after the very careful instructions which are laid down for the clerks of the copying department that the particulars given on the endorsement of these copies which were supplied are to be taken as inaccurate. I think it must be accepted, unless there is very clear proof to the contrary, that the information given on the endorsement of such documents is accurate and if that is so, it follows clearly that proper notification was given to the appellant in this case on 26th August as to the exact number of folios and stamps that would be required and that it was entirely due to some oversight or negligence on the part of her servant that a proper number was not supplied until 30th August and therefore it seems to me that no case has been made out why the applicant should be entitled to deduct from the limitation period anything more than the days between that upon which she complied with her obligation in supplying folios and stamps and that on which the copies were ready. That being so, it follows that her memorandum of appeal in this case was out of time.

We have been asked to deal with minute questions of whether or not in fact the copying work at the office could have gone on between 27th August and the 30th, even if the requisite number of stamps and folios had been supplied on the earlier date. I absolutely decline in a case of this sort to go into a long and speculative enquiry as to what might have happened in the circumstances and what did it in fact happen with regard to the copying of these documents. It must be accepted in all these cases that once an application is made and proper steps taken for obtaining copies of documents,

the office work goes on in the regular course and that unless and until the necessary requirements are complied with by the applicant for copies, he is not entitled to the benefit of any extra time to be added to the limitation period, merely on the ground that possibly, if long and intricate enquiries are made, it will be found that in any case even if he had complied with his obligations, still the same amount of time would have been occupied in providing copies of the document.

The only other question which we have to deal with is whether having regard to the advice which the appellant received from her vakil in this case, she is entitled to an extension of time under S. 5, Lim. Act. In ordinary circumstances it may be that where there is no settled practice or where there is perhaps a difficult question of law to be decided and a party taking the best advice he can from his legal advisers makes what the Court eventually finds to be a mistake in filing his memorandum of appeal after the limitation period has expired that the Court will in such circumstances regard that as a proper reason for extending the limitation period, but in the present case although I have no doubt that Mr. Khurshed Husnain in advising his client was of opinion that the period of limitation would expire on 2nd December, nevertheless if he had been informed by his client who instructed him as to what the exact facts of the case were, it seems to me almost impossible that Mr. Khurshed Husnain or any other learned vakil of this Court could have advised his client that the limitation period would expire on 2nd December, and not as in fact it did on 28th November. So that if the appellant's karpardaz in this case received unreliable advice from his legal adviser, he had only himself to blame because that advice was given upon an untrue statement of facts, which was the only hypothesis upon which the legal adviser could give his opinion. In the circumstances this application must be dismissed with costs and the memorandum of appeal must be rejected. Hearing fee three gold mohurs.

Coutts J.—I agree.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 42

ATKINSON AND MANUK, JJ.

E. I. Ry. Co.—Defendant—Petitioner.
v.

Ajodhya Prasad and another—Plaintiffs—Opposite Parties.

Civil Revn. No. 173 of 1913, Decided on 3rd December 1918, from order of Munsif, Patna

(a) **Railways Act (1890), Ss 77 and 140—Notice must be served on Agent or Manager—Service of notice is condition precedent and must be served within 6 months from cause of action.**

A notice under S. 77 in order to be valid must be served upon the Agent or Manager of the company and not upon a subordinate official of the company. The service of such notice upon the Agent or Manager is a condition precedent to the right to sue and the same must be served within six months from the date when the claim or cause of action accrues. [P 43 C 2]

(b) **Railways Act (1890), S. 72 — Risk note B—Loss of goods consigned—Plaintiff must prove wilful neglect or theft by servants.**

Where goods are consigned to a Railway Company for carriage under risk-note form B and are lost, the onus is on the plaintiff who had elected to make his own contract according to his own choice and for his own benefit to prove that the loss is due to the wilful neglect of the Railway administration or to the theft by or wilful neglect of his servants. [P 44 C 2 P 45 C 2]

Susil Madhab Mullick and Siva Narayan Bose—for Appellant.

Chandra Sekhar Banerji—for Respondents.

Atkinson, J.—The plaintiff sued the East Indian Railway Company to recover damages for the loss of two tins of ghee. The ghee was consigned from Coconada on 26th December 1916, and admittedly the two tins formed part of a large consignment of twenty-six tins in all. Although the ghee consigned passed over the lines of several Railway Companies, admittedly the East Indian Railway Company received the full consignment of twenty-six tins for delivery to the plaintiff. Twenty-four tins of the total consignment were delivered to the plaintiff as consignee on 13th January 1917. Two tins were lost. The plaintiff embarked upon a correspondence with the Railway Company through some of its subordinate officials with reference to the loss of the two tins of ghee. This correspondence continued from the month of April to the month of July 1917. At no time prior to 13th November 1917 did the plaintiff give notice direct to the Manager or Agent of the East Indian Railway Company of the admitted loss of two tins of ghee, or make any claim in respect thereof to him. Two points are

taken on behalf of the company before us. The learned Munsif overruled the preliminary objection urged on behalf of the company, namely, that inasmuch as notice under S. 77, Railways Act, 1890, had not been served in accordance with the requirements of the Act, therefore this action was not maintainable. The learned Munsif who tried the case overruled that contention, relying upon a decision reported as *Woods v. Meher Ali Bepari* (1) and held that although notice under S. 77, admittedly had not been served within the period prescribed by the statute, nevertheless by some indirect means it might be inferred that the manager or agent of the company through the District Traffic Manager had notice of the plaintiff's claim.

With reference to the second argument addressed to us as to the liability of the company on foot of the contract made by the receiving company with the consignor for the carriage of goods consigned the learned Munsif appears, although the point was argued before him, to have ignored entirely this matter in his judgment; and certainly the question urged was one which the Munsif should have considered and decided before imposing liability upon the company. However I shall deal with this aspect of the case later. If in fact notice was not served in the manner prescribed by S. 77, Railways Act, this action would not be maintainable. There is a consistent line of authority in favour of that view. What are the requirements of S. 77? S. 77 provides: that a person shall not be entitled to a refund or to compensation for loss, destruction or deterioration of animals or goods delivered to be carried unless his claim to a refund or compensation has been preferred in writing by him or on his behalf to the Railway administration within six months from the date of the delivery of animals or goods consigned for carriage by the Railway, company. S. 140 prescribes the method and manner in which the notice under S. 77 is to be served and the person on whom it is to be served. The person on whom the notice is to be served is the agent or manager of the company. The notice is to be served on either of these persons and no one else. The manner of serving the notice may be either by personal delivery or by registered post

(1) [1907] 3 I. C. 479.

either of which courses are optional at the election of the party serving such notice. It is conceded in this case that the notice required by S. 77 was not served antecedent to 13th November 1917; and no stronger proof of that fact could be adduced than the very letter which was written on behalf of the plaintiff by his solicitors to the East Indian Railway Company addressed to the agent bearing the date of 15th November 1917. That letter is headed with the words "Notice under S. 77 of Railways Act," and in the body of that letter the following passage occurs:

"I have been requested by my client aforesaid to give notice under S. 77, Railways Act of 1890, claiming Rs. 53 as the price of two tins of ghee and the price of the tins themselves, besides Rs. 9 8 0 interest on the aforesaid Rs 53 at the rate of Rs. 2. Total Rs. 62."

That letter was written on behalf of the plaintiffs; but at no prior time can it be suggested that there was any claim whatsoever made upon or addressed to the manager or agent of the East Indian Railway Company with reference to the plaintiff's claim for compensation for the loss of the two tins of ghee. It is admitted that the District Traffic Manager of the East Indian Railway Company did receive a letter with reference to the plaintiff's claim dated 25th April 1917. But such communication addressed to the District Traffic Manager is not a notice in accordance with the requirements of S. 77 read with S. 140 Railways Act, 1890. The notice to be a valid notice, must be served upon the agent or manager of the Company, and not upon a subordinate official of the Railway Company and the service of this notice upon the agent or manager is a condition precedent to the right to sue and the same must be served within six months from the date when the claim or the cause of action accrued.

Now the notice that was served for the purpose of complying with the requirements of S. 77 was served on the 13th November 1917, much more than six months after the cause of action arose. There is a consistent line of authority in Calcutta in favour of the opinion we hold and the construction which we put upon S. 77 and S. 140, Railways Act. The cases are the following: *East Indian Railway Co. v. Madhu Lal* (2), *Radha Kissen Chooni Lal v. East Indian*

(2) [1913] 19 I. C. 673.

Railway Co. (3), East Indian Railway Co. v. Ramgati Ram (4) East Indian Railway Co. v. Ram Autar (5), Janki Das v. Bengal Nagpur Railway Co. (6), Nadia Chand Shaha v. Wood (7) and Secretary of State v. Dip Chand Poddar (8). The learned vakil appearing on behalf of the plaintiff relies upon the case cited as *Woods v. Meher Ali Bepari* (1) in support of his contention, that you may in fact serve with notice a subordinate official of the railway company, from which fact it may be inferred that such notice might or may have reached the agent or manager of the railway company. We do not think that this decision is in accord with the whole trend of modern authority in the Calcutta High Court, and it seems to us to be inconsistent with the express and mandatory provisions of the Act itself. The Act has defined and determined how the rights of the parties damaged are to be exercised and controlled and the declaration of the legislature as embodied in the Act is the determining factor: and it is not open to any Court to disregard or relax the provisions of an enactment if they are express and clear and otherwise free from ambiguity and doubt, with reference to the enforcement of rights against public Companies and Corporations. It is a common thing indeed in England for Acts of Parliament to provide that actions against Companies or other corporate bodies shall only be instituted after a statutory notice of claim has been given to the corporate body against whom any form of relief is claimed; and the service of such a notice is a condition precedent to the maintainability of any action or suit against such Company or Corporation.

Therefore in the view we have taken we think that the learned Munsif was wrong in holding that notice had been sufficiently served in accordance with or in such a manner as to satisfy the requirements of S. 77, Railways Act, 1890, and that the plaintiff's suit was maintainable. We are of opinion that the action instituted by the plaintiff was not maintainable by reason of the nonservice of the notice in the manner and within

the time required by S. 77, Railways Act. However there is a further ground dealt with by the learned Munsif in his judgment which was entirely wrong in the conclusion at which he arrived. The plaintiff or his agent who consigned the 26 tins of ghee to him at Coconada, thought fit to book the consignment on what is known as the risk-note form B. There is no question that risk-note form B satisfied for the purposes of its validity all the requirements of the Railways Act as enacted in S. 72. The form received the assent of the Governor-General in Council; and complies in every detail with the statutory form embodied in the Act itself. The object of this form of consignment note is to enable goods to be consigned at a lower rate than the ordinary rate of freight charged, on condition that the owner, consignor or consignee as the case may be will accept all liability for risk, loss or damage of the goods so consigned. The material part of the risk-note in question is that it exempts the Company from all liability for loss, damage, deterioration or otherwise for the goods carried under such terms by them. An exception to the consignor's or consignee's liability is provided for; and this case comes within the terms of the exception. The exception provides for the liability of the company for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration or to the theft by or wilful neglect of its servants, transport agents or carriers employed by them.

The two tins of ghee that were lost were two complete packages forming part of a complete consignment; and in order to impose liability on the railway company the onus is upon the plaintiff to prove that the loss of the packages in question was due to the wilful neglect of the railway administration or to the theft by or wilful neglect of its servants. The learned Munsif has not adequately considered the legal effect of this contract made between the parties; because he holds that the onus is upon the defendant company to bring themselves within or without the terms of the exception. We entertain a wholly different view. The onus is upon the plaintiff who has elected to make his own contract according to his own choice and for his own benefit, to

(3) [1913] 21 I. C. 970.

(4) A. I. R. 1914 Cal. 645=23 I. C. 142.

(5) [1917] 38 I. C. 502.

(9) [1912] 13 I. C. 509.

(7) [1908] 25 Cal. 194.

(8) [1897] 24 Cal. 206.

prove that if damage has been caused to him by the loss of goods consigned by him to the Company that the damage ensued within the provisions of the exception. The onus is cast upon the plaintiff, and not upon the defendant, to prove that the loss arose by reason of the wilful neglect of the Company or its servants. The only reason the learned Munsif gives for holding that the onus is upon the defendant, is because the defendants plead the exception in exoneration of liability in their written statement. Clearly the mere fact that in the written statement the exception provided and embodied in the contract, is pleaded in exoneration of liability is no ground for holding that the onus is cast upon the Company to establish by proof facts which would negative their liability within the terms of the exception. It would be impossible to hold that the onus was on the defendants. The onus is on the plaintiff. Therefore for this reason also the judgment of the learned Munsif is erroneous; and inasmuch as no evidence of wilful neglect by the Company or its servants has been given or adduced by the plaintiff, facts have not been established to justify imposing any liability upon the East Indian Railway Company for the loss of the two tins of ghee in suit.

However, as we have held that notice was not served, which is a condition precedent to the plaintiff's right to sue, in accordance with S. 77, Railways Act, 1890, this action is not maintainable. The judgment of the learned Munsif is set aside and the action will be dismissed. However, we venture to commend to the consideration of the East Indian Railway Company, who are always very generous towards persons who have suffered loss through any misfortune either on their part or otherwise, the claim of the plaintiff for some monetary compensation for the loss he has admittedly sustained. Under the circumstances of the case we are not prepared to award costs to the defendant Company, and we think that both sides should bear their own costs.

Manuk, J.—I agree. It is only necessary for me to add a few words on my own behalf. The terms of S. 77 read with S. 140 are to my mind so explicit and imperative as to leave no doubt that the only person on whom notice can properly be served for a suit of this nature is the

agent of the Company. The terms of S. 140 are also so explicit that there can equally be no doubt as to the manner in which that notice must be served. There is therefore no room for a theory of substituted notice which forms the basis of the decision in *Woods v. Meher Ali Bepari* (1). That decision moreover was expressly dissented from in *Radha Kissen Chooni Lal v. East Indian Railway Co.* (3) and is of very doubtful authority.

V.S./R.K.

Order accordingly.

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Special Bench

DAWSON-MILLER, C. J., COUTTS
AND DAS, JJ.

Mohan Das Pujhari—Petitioner.

v.

Emperor—Opposite Party.

Civil Revn. No. 62 of 1919, Decided on 5th May 1919.

(a) Legal Practitioners Act (1879), S. 36—Inclusion of person in list of touts—Proceedings under S. 36 are necessary.

Before directing the inclusion of a person's name in the list of touts, it is necessary that proceedings should be taken in accordance with S. 36, and the person be given an opportunity of showing cause against the inclusion. [P 47 C 1]

(b) Legal Practitioners Act (1879), S. 36—Duties cannot be delegated to subordinate officers.

The duties to be undertaken under S. 36 cannot be delegated by any of the officer mentioned therein to their subordinates. [P 46 C 2]

Gajendra Prasad Das—for Petitioner.

Dawson-Miller, C. J.—This is an application in revision on behalf of one Mohan Das Pujhari asking us to set aside an order of the District Magistrate of Balasore including the name of the petitioner in the list of touts framed under S. 36, Legal Practitioners Act. The case for the petitioner is that there is nothing to show that the District Magistrate could be satisfied by any evidence that the petitioner was a tout; secondly, that there was no evidence recorded in accordance with the provisions of that section; thirdly, that in so far as any inquiry was held or any evidence recorded this inquiry was held and the evidence recorded not by the District Magistrate himself but by the Subdivisional Officer, and that the District Magistrate had no power under the section to delegate his authority to the Subdivisional Officer.

What happened was that upon an anonymous petition being sent to the Dis-

trict Magistrate complaining of the action of the petitioner, the Deputy Magistrate, who appears to have dealt with the case, ordered the police to make an inquiry and report. That was on 14th November 1918. The police apparently made some inquiries and sent a report signed by a Sub-Inspector on 2nd December 1918 in which they reported that inquiries had been made from the village chaukidar and daffadars and some villagers and they had ascertained that the petitioner was a tout and very often visited Court. Thereupon the petitioner was called upon to show cause before Mr. Bose, the Subdivisional Officer of Balasore. On 14th December, he seems to have appeared before the Subdivisional Officer and filed a petition to the effect that the charges against him were not true and that he was not a tout. Mr. Bose, the Subdivisional Magistrate, thereupon ordered Mr. Samad, a Deputy Magistrate to make an inquiry and report and on 3rd January Mr. Samad reported that he had inquired of clerks and peshkars in several Courts and public officers and that nearly all of them said that the petitioner was a tout and frequently came to Court and that, in his opinion, the petitioner was a professional tout and he recommended that he should be so declared. This report was made to and received by the Subdivisional Officer either on the same day or the following day and on the following day, 4th January, Mr. Bose, the Subdivisional Officer, passed an order to this effect:

"The cause shown by Mohan Das Punjhari cannot be accepted. Maulvi A Samad, Deputy Magistrate, made a local inquiry and his report shows that accused habitually acts as a tout. His name may be included in the list of touts under S. 36, Legal Practitioners Act. Submitted to District Magistrate.

(Sd.) S. C. BOSE.
Subdivisional Officer."

In the margin of that order appear the following word: "Approved. (Sd) M. K. Deb" and the date 4th January 1919. Mr. Deb is the District Magistrate of Balasore. Turning to S. 36, Legal Practitioners Act, it is quite clear that the only person in the present instance who would be entitled to place the petitioner's name on the list of touts would be the District Magistrate himself. That section provides that a District Magistrate (amongst other officers) may frame and publish list of persons proved to his satisfaction by evidence of general repute or

otherwise, habitually to act as touts, and may from time to time, alter and amend such lists. It is quite clear, from what I have just said, that it would be very difficult, indeed, to say that there had been any proof whatever to the satisfaction of the District Magistrate that the petitioner was a tout. The District Magistrate held no inquiry, he recorded no evidence, he had no opportunity of seeing the witnesses who gave evidence before Mr. Samad, the Deputy Magistrate, and all he did was to approve and sign an order made by the Subdivisional Officer. Further, the section nowhere provides that these duties, which are to be undertaken by the officers who are mentioned therein can be delegated by any of those officers to their subordinates and it seems to me that in both these respects this order which was not made by Mr. Deb, the District Magistrate, but merely had his approval cannot possibly stand.

The matter has been before the High Court of Calcutta on more than one occasion on facts very similar to the present and in the case of *Chandi Charan Dey, In re* (1), there is decision of the Ram-pini, Ag. C. J., and Ryves, J., which appears to me to apply to the circumstances of this case. In that case a Subdivisional Officer called on a person to show cause why he should not be declared a tout. He shewed cause and the Subdivisional Officer after recording evidence on both sides, submitted the proceedings with his report to the District Magistrate who, after perusing them, passed order declaring the person to be a tout. In such circumstances the High Court of Calcutta, acting upon the authority of an earlier unreported decision of the Chief Justice and Banerjee, J., in 1897, set aside the order on the ground that it was made in contravention of the powers granted by S. 36, Legal Practitioners Act. I am unable to distinguish the facts of the present case from the material facts in the case just referred to and, in my opinion, this order must be set aside on the grounds already stated. We have no materials before us, nor is it any part of our duty to express any opinion, as to the conclusiveness or otherwise of the evidence upon which the Subdivisional Officer and the Deputy Magistrate acted. However that may be before

(1) [1908] 12 C. W. N. 842.

the petitioner can be declared a tout it is necessary that proceedings should be taken in accordance with S. 36, Legal Practitioners Act; and moreover that he should be given an opportunity of showing cause against the inclusion of his name in the list of touts.

Coutts, J.—I agree.

Das, J.—I agree.

V.S./R.K.

A. I. R. 1919 Patna 47

ROE AND JWALA PRASAD, JJ,

Tikait Lal Narayan Singh — Plaintiff—Appellant.

v.

Christien and others — Defendants—Respondents.

Appeal No. 16 of 1914, Decided on 22nd November 1918, against original decree of Special Sub-Judge, Hazaribagh, D/17th September 1913.

Mortgage—Money decree obtained against mortgagor by third person—Sale of equity of redemption—Purchase by mortgagee is valid—Mortgagee does not become trustee of mortgagor.

There is nothing in law to prevent a mortgagee from purchasing the equity of redemption at an auction sale in execution of a money decree obtained against the mortgagor by a third person. By such purchase the mortgagee does not become the trustee of the mortgagor in respect of the equity of redemption. [P 50 C 1 2,]

Plaintiff mortgaged certain property to the defendant by way of conditional sale and the major portion of the consideration was left in the hands of the defendant to pay off the plaintiff's creditors. Subsequently the equity of redemption was sold in execution of certain money decrees obtained against the plaintiff and was purchased by the defendant. It was found that at the time of the sale there was not enough money left in the hands of the defendant out of the mortgage consideration to pay off the money decrees:

Held, that the purchase by the defendant of the equity of redemption was valid and that he could not be held to be a trustee for the plaintiff in respect thereof. [P 50 C 2]

Rajendra Prasad—for Appellant.

Kulwant Sahay—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit for a declaration of the plaintiffs' right of redemption of the property known as Gaddi Dome Chaunch bearing Touzi No. 8, District Hazaribagh held in mortgage by the respondent F.F. Christien under a bai-ul-wafa deed (mortgage by conditional sale) executed by Maharaj Singh and Ajant Singh, grandfather and father of the appellant respectively. The mortgage purports to secure the payment of Rs. 2,08,000, out of which Rs. 11,000 was paid in cash and

the balance of Rs. 1,97,000 was left in the hands of the mortgagee in order that he might pay the debts of the mortgagors in the order mentioned in the deed, firstly, all sums due to the decree holders in execution of whose decrees the mortgaged property had been attached, secondly, all sums due to the holders of mortgages of various kinds on the property mortgaged to Mr. Christien, thirdly, Rs. 10,000 due to the mortgagee himself on account of debts under prior mortgages and other debts detailed in Sch. 2 attached to the deed: and lastly, the balance, if any to the other creditors of the mortgagors. The mortgage-deed was executed on 7th June 1901: vide terms of the deed and the plaint para. 5.

In 1903 and 1904 three decrees for money were obtained against the mortgagors, namely, (1) by Kedar Nath Sahay under a simple bond dated 18th July 1906, for Rs. 3,950, (2) by Kalendar Khan Kabuli under a hand note dated 26th November 1900, for Rs. 1,200, and (3) by Durga Rai under a hand note dated 30th August 1,307, for Rs. 3,100. In execution of those decrees the equity of redemption in the mortgaged property was put up to sale and was purchased by the mortgagee Mr. Christien, for Rs. 4,150 on 3rd March 1904. The date for redemption fixed in the mortgage-bond is Jaith 1318 corresponding to 1911. The present suit was brought on 27th May 1908 by the mortgagors for a declaration of their right of redemption on the allegation that on 3rd March 1904, the date on which the mortgagee purchased the equity of redemption at the auction sale he had considerable sums in his hands due to the mortgagors and was bound to pay off the decrees in execution of which the property was put to sale and that he was not entitled to purchase the property for himself. It was asserted that in the circumstances the purchase by the mortgagee was for the benefit of the mortgagors and that he should be treated as a trustee for them. The relief sought in the plaint sums up the whole case of the plaintiff and is in the following words:

"That it may be declared that the purchase of right of redemption of the mortgage made by the defendant was made by him as trustee on behalf of the plaintiff from out of the consideration money covered by the deed of conditional sale for the benefit of the plaintiff and that it is not and

cannot be prejudicial to the interest of the plaintiff and beneficial to the defendant."

The defendant Mr. Christien, resisted the plaintiffs' claim and denied that he had purchased the property for the benefit of the mortgagors, or that he was their trustee. He further stated that when the purchase was made on 3rd March 1904, the prior mortgage debts due by the plaintiffs on the property far exceeded the amount that remained in his hands after paying some of the prior mortgages and other debts and that he had no surplus money to pay the other debts or the decrees in execution of which the equity of redemption was sold. He gave an account in the written statement of the amounts paid by him, the mortgage debts that still remained to be paid and the balance in his hands. He also contended that it was decided in the cases of Kedar Nath and Kalendar Khan, in whose decrees the property was sold, that he was not bound to pay the said decrees and that the said decisions were binding on the plaintiffs and operated as a bar to the present suit. We are not concerned with the other pleas taken in the written statement for the purposes of this appeal. The following principal issues with which we are here concerned were framed by the Subordinate Judge:

- (1) Was the defendant a trustee for the plaintiff entitled to the declaration asked for? (Issue 3 of the Court below).
- (2) Can the defendant derive any benefit from his auction purchase of Gaddi Dome Chaunch? (Issue 4 of the Court below).
- (3) Are the judgment and order passed in the cases of Kedar Nath and Kalendar binding on the parties? (Issue 5 of the Court below).

The suit was originally brought by Tikait Ajant Singh, father of the appellant. Although the suit was instituted on 27th August 1909, it was not decided till 17th September 1913 probably due to a dispute between the original plaintiffs and their assignees as to who should be the plaintiffs, which was ultimately set at rest by the order of the Court dated 2nd April 1913, and the suit proceeded with the appellant and his father as co-plaintiffs, Tikait Maharaj Singh one of the executants of the mortgage deed having died before the institution of the suit. The Court below decided all the aforesaid issues against the plaintiffs and dismissed the suit. An appeal was filed by the

plaintiffs in the Calcutta High Court on 22nd January 1914. Thereafter Tikait Ajant Singh died and the appellant was substituted as the sole appellant on the 8th January 1917. The appeal was heard by this Court on 18th June 1917. There was no issue nor any proper evidence as to the payments of various kinds said to have been made by the defendant mortgagee. The case was, therefore remanded by this Court, for determining certain issues, framed by this Court regarding the amounts of decrees, mortgages and other debts paid by the mortgagee, the amount of the mortgage debt that still remained to be paid and the balance that was in the hands of the mortgagee on 3rd March 1904. The Court has now returned its finding on the issues remitted for determination per its judgment dated the 25th September 1917. The appellant has filed additional objections to the findings of the Court. The respondent, Mr. Christien, has also filed objections in respect of the payments alleged by him that have been disallowed by the Court below. In the course of an argument before us, the learned vakil on behalf of the appellant repeated the objections made by him in the Court below as to the proper proof of the prior mortgage deeds and other documents filed on behalf of the defendant showing the payments made by him. For instance, it was said that the mortgage bond No. 13 of Ram Kumar Lal was not properly attested inasmuch as the attesting witnesses say in their signature that they attested it on the admission of the executant.

The Court below has rightly held that this would not show that the witnesses did not actually see the executant sign the deed. Two of the attesting witnesses, Siwan Mistri (D. W. 8) and Ram Charan Ram (D. W. 42), definitely swear that the executant signed in their presence. The Court was perfectly right in accepting the evidence and in holding that the document was properly attested and proved. This was the nature of the objection in respect of some other documents. We overruled all the objections and pointed out to the learned vakil that there was no substance in them. The argument of the learned vakil was half-hearted. The finding of the Court below was ultimately accepted by the learned

vakil as correct. The respondent also did not press his objection in respect of the items disallowed by the Court below. As a matter of fact, I have carefully gone through the entire evidence in the case and I agree with the finding of the Court below as to the proof of the debts and the documents and the payments thereof by the respondent. The Court has gone into

detail in respect of each item, a perusal of which will convince that there is no room to dispute the correctness of its finding. The account given in the judgment remains unchallenged and as a matter of fact is not disputed at the Bar. According to the finding the following payments made by the mortgagee have been proved:

	Actual payment.			Remission by compromise or otherwise with the creditors.		
	Rs.	a.	p.	Rs.	a.	p.
(1) Cash paid to Tikait	11,000	0	0			
(2) Amount paid for decrees in execution	21,614	15	0	19,368	6	0
(3) Mortgage debts paid	1,18,607	13	1	1,06,168	11	0
(4) Other debts paid in accordance with the mortgagors' authority	2,977	0	0	2,950	0	0
(5) Other debts without Tikait's authority	3,552	2	3	2,457	2	9
Total	1,57,851	14	4	1,30,944	3	9
					15,907	10 7

According to the terms of the deed out of the sum remitted by the creditors, namely Rs. 15,907-10-7, half belongs to Tikait mortgagors and half to the mortgagee. Half the share of the mortgagee is to be added to the consideration money of the bai-ul-wafa payable to the mortgagors. The consideration money that the mortgagee had to pay therefore amounted to Rs. 2,08,000 plus Rs. 7,953-13-3, total Rs. 2,15,953-13-3. The balance in his hands at the time of the purchase of the equity of redemption by the mortgagee was thus Rs. 58,102 6 11. The amount of the mortgage debt remaining unpaid on the date of the purchase was Rs. 1,09,543-12-5. Thus the mortgagee had to pay on account of the mortgage debts Rs. 51,441-5-6 more than what he had in his hands. Even if the sum of Rs. 2,457-2-9 paid to the creditors without the authority of the mortgagor be not taken into account, the mortgagee had in his hands Rs. 38,983-2-9 less than what he had to pay for the rest of the mortgages.

The mortgage debt actually paid was Rs. 1,06,168-11-0 and the balance of the mortgage debt still remaining unpaid, Rs. 1,09,543-12-5, making a total of Rs. 2,15,712-7-5. The consideration of the bai-ul-wafa was not therefore sufficient to pay off all the mortgage debts, not to speak of the decrees and the other debts of the mortgagors. Under the terms of the deed, as set forth in the earlier part of the judgment, the mort-

gagee was not under any obligation to pay off the other debts of the mortgagors unless the outstanding decrees and the mortgage debts were altogether paid off. This was not denied in the plaint, vide paras 5 and 11. The plaintiffs' case was that the mortgagee had Rs. 62,000 in his hands whereas the unsatisfied decrees on the date of the sale amounted to Rupees 47,000. As shown above, the plaintiffs' case has been held to be untrue and it has been found that the mortgage debt amounted to a much larger sum than the balance in the hands of the defendant on the date of the sale. The defendant was therefore not bound to pay off the decrees obtained in 1903 and 1904 long after the execution of the bai-ul-wafa, in execution of which the equity of redemption was sold and purchased by the mortgagee. As a matter of fact, the point was expressly decided in one of these cases, namely Suit No. 27 of 1903, by Kedar Nath against the mortgagors and the respondent. Both Kedar Nath and the mortgagors, present plaintiffs, pleaded that the mortgagee was liable under the bai-ul-wafa to pay off the claim by Kedar Nath. This was the principal issue in the case and it was held that the respondent was not liable to pay the same (vide judgment Ex. W). In the execution of Kalendar Khan's decree, the money in the hands of the mortgagee was attached, but it was released on his objection (vide order-sheet in Execution Case No. 47 of 1903, Ex. W₁). Not

only that the mortgagee is not liable under the orders of the Court to pay the amount, but the decision in the case of Kedar Nath would operate as *res judicata* on the present claim of the plaintiffs inasmuch as the issue was directly raised between the mortgagors and the mortgagee although both were defendants. The mortgagors tried their best in all the aforesaid three cases to fasten the liability of the plaintiffs in those cases upon the mortgagee but they failed. It must therefore be held that both on facts and law the mortgagee was not liable to pay the decrees in execution of which he purchased the equity of redemption.

It has then been contended as a general proposition that the mortgagee, by his purchase during the continuance of the mortgage, was a trustee for the mortgagors and that it should be held that the purchase was for the benefit of the latter. An attempt was made to show that the mortgagee purchased the property in collusion with Durga Rai, one of the decree-holders. In support of this, Durga Rai himself has been examined on behalf of the plaintiffs. The Court below, by its judgment of 17th September 1913, has rejected the evidence of Durga Rai as being unsupported by any evidence. The finding of the Court below on this point has not been disputed in the argument of the learned *vakil* on behalf of the appellant. As a matter of fact there is nothing to show that there was any collusion or fraud in the purchase by the mortgagee of the equity of redemption. Unless there was any device or contrivance on the part of the mortgagee in making the purchase, it cannot be held that his purchase was for the benefit of the mortgagors and that the equity of redemption still subsists in the mortgagors. No doubt, the mortgagee is under certain obligations to the mortgagors, but he has rights of his own which he may exercise adversely to the mortgagors. The proposition that a purchase by a mortgagee of the equity of redemption constitutes him a trustee for the mortgagor and that he does not acquire an irredeemable title, is too wide, vide *Tagore Law Lectures* by Sir Rash Bihari Ghose, Edn. 4. Vol. 1, pp. 199 and 207, and Vol. 2, pp. 987 and 988. There is nothing in law to prevent a mortgagee from purchasing the equity of redemp-

tion. Under the present law, O. 34, R. 14, a mortgagee is entitled to purchase an equity of redemption in satisfaction of a claim which does not arise under the mortgage.

This disability prior to 1908, when S. 99, T. P. Act, was in force, applied whether the claim arose under the mortgage or otherwise, but there was no disability in the mortgagee purchasing the property in execution of a money-decree of a third person. There was therefore nothing in law in 1904, when the mortgagee purchased the property, to prevent him from acquiring an irredeemable title to it, provided he was not guilty of any fraud collusion or device designed to defeat the mortgagors' right of redemption. For a fuller discussion, see *Pandit Sheo Narain Ojha v. Ram Jatan Ojha* (1). In equity the mortgagee could not be considered to have purchased the property for the mortgagors. There is no bar to a mortgagee purchasing the equity of redemption at a private sale from the mortgagor. There could not be any such bar when the property is sold at a public auction in execution of money decrees against the mortgagor. If a third person could purchase the property, why should the mortgagee be in a worse position? In the present case if the mortgagee had not purchased the property after having paid a large sum on account of prior decrees, mortgages and other debts, he would have been put to a very serious loss, and far from any equity being on the side of the mortgagors, it is clear that attempts have been made throughout in the course of proceedings in which the money decrees were obtained to compel the mortgagee to pay much more than what he was liable to under the *bailulwafa* deed. The account will show that to some extent the mortgagors have succeeded. The contention of the judgment-debtors that the purchase by the mortgagee constituted him a trustee for the mortgagors must therefore be overruled. The judgment of the Court below has not been attacked on any other ground. The result is that the appeal is dismissed with costs.

Roe, J. — I agree that this appeal should be dismissed. By the order of remand made by the learned Chief Justice and my learned brother, it was clearly intended that the decision should fol-

(1) [1917] 2 Pat. L. J. 587=41 I. C. 533.

low the line taken by the learned Chief Justice and my learned brother in the case of *Pandit Sheo Narain Ojha v. Ram Jatan Ojha* (1). My learned brother has shown clearly that the finding on the issues remitted to the lower Court was correct. There was nothing in the mortgagee's hands which could be regarded as money of the mortgagors. He was therefore entitled when the equity of redemption was put up to sale to protect himself by purchasing that equity out of his own moneys. The equity of redemption was legally sold and purchased. The plaintiff has now no interest therein. The suit was rightly dismissed.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1919 Patna 51**

ATKINSON AND COUTTS, JJ.

Suraj Prosad Mahajan—Appellant.

v.

Karu Singh—Respondent.

Appeal No. 1246 of 1917, and Nos. 84 to 94 of 1918, Decided on 8th April 1919, from appellate decrees of Dist. Judge, Gaya, D/- 6th September 1917.

(a) **Bengal Tenancy Act (1885), S. 70—Failure to give landlord opportunity of being heard vitiates proceeding.**

A failure to give a landlord an opportunity of being heard in a proceeding under S. 70 is an irregularity going to the root of jurisdiction and vitiates the whole proceeding. [P 53 C 1]

(b) **Bengal Tenancy Act (1885), Ss. 69 and 70—Order by Collector directing deposit in Treasury without payment is not final.**

In order to bring proceedings under Ss. 69 and 70, Ben. Ten. Act, it must be shown that, as required by S. 70 (5), the Collector has passed an order having complete finality and enforceable as a decree. An order directing the deposit of money in the Treasury without any direction for payment of the amount to any one is not such an order. The fact that, generally, under the batai system the division is half and half, is not enough to dispense with the necessity of a final order enforceable as a decree. [P 53 C 1]

*Manuk and Rai Guru Saran Prasad—*for Appellant.

*H. L. Nandkeolyar and Kailaspati—*for Respondent.

Coutts, J.—These appeals arise out of certain suits for rent. The plaintiff in each of the suits is the landlord and the suits were brought against tenants for 1321 and 1322 F. S. according to the danabandi system. The defendants contended that the system under which they held was the batai system; that the whole crop of 1321 and the paddy crop of 1322 had been divided by an order of the Deputy Collector under Ss. 69 and 70,

Ben. Ten. Act; that this order was final and could not be questioned in a civil suit, and that consequently there was nothing due for the year 1321 F. S. or on account of the paddy crop of 1322 F. S. The Court of first instance found that the system under which the defendants held was batai; but that the proceedings of the Deputy Collector under Ss. 69 and 70, Ben. Ten. Act, were no bar to the plaintiffs' suit, because the tenants had been guilty of fraud by removing a portion of the crop before the final division. The Subordinate Judge also found that the order of the Deputy Collector was vitiated by the fact that the plaintiff had not been given an opportunity of being heard as required by S. 70 (4). He therefore decreed the suits at certain modified rates.

Against these decrees appeals were preferred to the District Judge both by the plaintiff and by the defendants. The District Judge, in regard to the suits with which we are at present concerned, held that the tenants had not committed fraud, that the landlord had been given an opportunity of being heard within the meaning of S. 70 (4) and that the proceedings and order of the Deputy Collector sufficiently complied with the law, and were binding. Against these decrees of the learned District Judge the 12 appeals now before us have been filed. There can now be no question of the system under which the tenants hold, because there is a concurrent finding of the Courts below that it is batai and with this finding we cannot interfere in second appeal. Mr. Manuk however for the appellant has contended that the whole of the proceedings before the Deputy Collector, not being in accordance with the provisions of Ss. 69 and 70, are bad; that the order of the Deputy Collector, dated 19th March 1914, is not such an order as is contemplated by S. 70, and that it cannot therefore oust the jurisdiction of the civil Court. We are in these appeals concerned with only three proceedings before the Deputy Collector. The order sheets of these proceedings and certain petitions in connexion with them have been placed before us, and they certainly show a most extraordinary disregard by the Deputy Collector of the procedure which has been laid down in Ss. 69 and 70 of the Act. It is unnecessary to deal separately with each of the proceedings

because they are all of the same character. I will accordingly deal only with the proceeding No. 103 of 1913-14.

This proceeding was started on 22nd December 1913 by a petition filed by the tenants for a division of the crop on the batai system. On this petition a notice was issued to the opposite party, the plaintiff, who filed a twofold objections, first, that the system was not batai but danabandi; and, secondly, that the tenants had removed a great portion of the produce and that therefore a fair division could not be made. The Deputy Collector, entirely disregarding the first objection, gave an order to one Babu Tribeni Prasad to make a local inspection and to report whether the tenants had removed the crops so as to prevent a due division being made. Babu Tribeni Prasad, after considerable delay, did as he was ordered, and on his report the Deputy Collector, on 26th February, passed the following order:

"I am not satisfied that the tenants have removed any appreciable portion of the produce, and therefore order the produce to be divided. Let Babu Madhao Prasad divide on payment of Rs. 25."

This order was followed by an order of 19th March 1914 to the following effect:

"Khasra of division filed, Rs. 991-2 0 on account of sale-proceeds of hakmi share not being accepted has been brought by amin. Let Rs. 15 out of it be given to the amin as costs. The balance of Rs. 976-2-0 has been deposited in Treasury by chalan No. 291, dated 16th March 1914: case disposed of."

Mr. Manuk's first contention is that these orders show that the Deputy Collector did not consider the first objection. On the other hand, it is argued that the fact that the first objection is not mentioned in the orders shows that it had been dropped. I do not think the wording of the orders in any way supports the latter argument. The orders appear to show clearly that the question of whether the system was danabandi or batai was never considered at all. It may be that this does not go to the root of the matter and does not in itself show that the proceedings of the Deputy Collector were without jurisdiction; but it is material as showing the entire disregard of the procedure laid down which the Deputy Collector has shown throughout these cases. It is unnecessary to say more on this point, and I shall now consider the orders

with which we are more directly concerned.

The first of these is the order of 26th February 1914. The learned Judge is of opinion that the plaintiff was heard, but he says that even if the landlord was not heard he is not prepared to say that this was a fact which went to the root of jurisdiction, and, in support of this view, he refers to a judgment of Prasad, J., in an unreported case of this Court. This judgment is also relied on by the learned counsel for the respondents. I am unable to accept the finding of the learned District Judge that the opposite party was heard or given an opportunity of being heard: the order of 26th February makes no mention of any hearing or of any opportunity for hearing being given and I cannot believe in view of the wording of S. 70 (4) that, if an opportunity for hearing had been given, the fact would not have been mentioned. Nor, in my opinion, is the decision on which the learned District Judge relies one which has any application to the case now before us. It is true that the learned Judge has said in that judgment that a failure to hear under S. 70 would amount only to an irregularity, but the remark was merely obiter, because there was no doubt in that case that there had been a hearing and the whole of the rest of the proceedings were regular. I may be permitted to remark however that an opposite view has been taken by Mitter, J., that a failure to give the landlord an opportunity of being heard is an irregularity which would vitiate the whole proceeding and that with this view I am in agreement. Whether we accept the view of Prasad, J., or Mitter, J., however is not very material, because in this case the decision depends more particularly upon the next contention which has been urged before us by Mr. Manuk, namely that the order of the Deputy Collector does not amount to a final order such as is contemplated by S. 70 (5).

It was held by Jenkins, C. J., and Mookerjee, J., in *Kailaspati Narain Singh v. Gango Singh* (1) that in order to bring proceedings under Ss. 69 and 70, Ben. Ten. Act, it must be shown that as required by S. 70 (5), the Collector has passed an order having complete finality and enforceable as a decree. With this

(1) [1909] 4 I. C. 735.

view I am in entire concurrence. I have already referred to the wording of the order. It has been conceded that the amin acted without jurisdiction in selling the crop, and on this ground alone I think that the order is without jurisdiction, but apart from this the order simply states that the balance of Rs. 976-2-0 has been deposited in the treasury by chalan, without any direction for the payment of this amount to any one. It would be impossible to execute such an order as a decree; it is in my opinion without finality and is consequently not such an order as is contemplated by S. 70 (5).

It has been argued on behalf of the respondents that in cases under the batai system there is no necessity for any final order in the nature of a decree at all because the decision is always half and half. In the first place, although generally under the batai system the division is half and half, it cannot be said that this is an absolutely universal rule. In any case however the contention is without force. S. 69 applies equally to cases of division of produce and of appraisal, as also does S. 70. There is no distinction between these two classes of cases, and a final order enforceable as a decree is as necessary in the one case as in the other. In the result then I would set aside the decrees of the District Judge.

The failure of the Deputy Collector to give an opportunity for hearing, as required by S. 70 (4), Ben. Ten. Act, went in my opinion to the root of jurisdiction, and in any case his orders which purported to be final orders where in no sense final, nor were they enforceable as decrees. These orders are therefore bad and are no bar to the present suits. I would remand these appeals for rehearing in order to enable a decision to be come to as to the amount to which the plaintiff-appellant is entitled. It is agreed that the rates, as found by the learned District Judge, are correct, but there is a dispute as to the area, and on this point the respondents desire an adjudication. The respondents are entitled to withdraw the amounts deposited in the Treasury as stated in the orders of the Deputy Collector under the chalans specified by him in his orders, dated 19th March 1914, 5th May 1914 and 3rd February 1915. The appellant will recover the costs of

this Court and the lower appellate Court.

Atkinson, J.—I agree.

V.S./R.K.

Appeals remanded.

A. I. R. 1919 Patna 53

ATKINSON AND JWALA PRASAD, JJ.

Siva Narayan Ram Marwari—Defendant—Appellant.

v.

Hari Narayan and others—Plaintiffs and Defendants—Respondents.

Appeal No. 26 of 1918, Decided on 15th May 1919, from appellate decree of Dist. Judge, Monghyr, D/- 8th June 1917.

Transfer of Property Act (1882), S. 101—Mortgagee purchasing equity of redemption—Lien is presumed to subsist.

Where a mortgagee purchases the interest of the mortgagor the presumption is that his mortgage lien would continue to subsist for his benefit.

[P 54 C 1, 2]

A. Majid Khan and L. M. Ganguli—for Appellant.

Akbari, Jagannath Prasad and D. N. Sircar—for Respondents.

Jwala Prasad, J.—This is an appeal against the order and decree of the District Judge of Monghyr, dated 8th June 1917, directing the sale of properties for the realization of money due on foot of a mortgage bond, dated 13th November 1899, executed by defendants 1, 2 and 3 and the father of defendant 1 in favour of plaintiff 2. Among the properties directed to be sold was property 1. Defendant 13, who is the appellant before us, had a prior mortgage over the said property along with others by virtue of a mortgage bond executed in his favour, dated 31st May 1897, for Rs. 3,833. His contention in the Court below was that the mortgage in favour of the plaintiff was subject to his prior mortgage of 1897. The Court below overruled this contention and held that the mortgage lien of defendant 13 was extinguished by the kabala (sale deed) taken by him in respect of the property in question from the mortgagors on 7th September 1901 for Rs. 5,000. Subsequent to the said kabala, the property was sold along with other shares for arrears of Government revenue on 20th March 1911 subject to encumbrances under S. 54, Revenue Sales Act, 2 of 1859. At that sale defendant 13 himself purchased the property and thus he occupied the same position as he had

under the sale deed of 7th September 1901.

The sole question therefore for consideration in this case is whether the prior lien of the appellant is extinguished. It has been contended by Mr. Majid appearing on behalf of the appellant that the intention of defendant 13 was to keep alive his prior mortgage lien in spite of the sale of the property in 1901. In support of this contention reliance has been placed upon para. 18 of the sale deed, Ex. B. The translation of kabala that was handed to us by Mr. Majid was not correct, as will appear from the translation now made of this document by the Court translator. In the translation handed to us the clause in question in para. 18 ran as follows:

"So the effect of the mortgage of the said bond is and shall remain in this Kabala, and also in the case of any dispute in these proceedings the said bond shall remain intact to the extent of consideration money mentioned in this kabala."

It was not clear from this translation that the prior lien was intended to be kept alive, and the true construction appeared to us to be that the prior lien was by this clause merged into the kabala. The translation was therefore liable to misconstruction. On the original document being read to us, we thought it desirable to have a true and faithful translation of the clause made by the Court translator. This has been done and the clause, as translated by the Court translator, runs as follows:

"Hence the entire mortgage lien under the aforesaid bond shall remain intact and in force with reference to this deed of sale."

It may be mentioned that in order to make it good English the words "with reference to this deed of sale" have been put down for the vernacular word "mai" in the document which literally means "in this deed of sale." The effect however of both renderings of the word "mai" in the document is the same and the Court translation is substantially correct. We would therefore accept the translation made by this Court for the purpose of considering the effect of the clause in question. There cannot possibly be any doubt that the mortgagee intended that his prior lien should remain intact and in full force, and the obvious object of it was that the prior lien should continue for his own benefit and as a shield against the subsequent mortgagees. Under S. 101, T. P. Act, where the holder or the owner

of a charge or other encumbrance on immovable property is or becomes absolutely entitled to that property, the charge or encumbrance is extinguished, unless there is a declaration in express words or necessary implication that the charge shall continue to subsist or such continuance would be for his benefit. There cannot be any manner of doubt that the subsistence of the lien of defendant 13 in this case was for his benefit and it is reasonable to presume that his intention in taking the kabala was to keep alive his prior lien. Even if the words in para. 18 of the Kabala were of doubtful interpretation, the presumption would be made in favour of the prior mortgagee and as against merger. The cases of *Gokaldas Gopaldas v. Puranmal Premsukhdas* (1) and *Mahalakshammal v. Sriman Madhva Siddhantha Oonahini Nidhi, Ltd.* (2), and *Gopal Chunder Sreemany v. Herembo Chunder Holder* (3) are authorities for the aforesaid proposition.

I therefore hold that the lien of defendant 13 over property No. 1 created by the mortgage bond of 31st May 1897, was not extinguished by the kabala of 1901. The learned District Judge does not appear to have considered the said clause in the kabala, and no reason has been given by him for holding that the mortgage of defendant 13 was extinguished. The result is that the appeal is allowed with costs and the decree of the learned District Judge is modified with respect to property No. 1. Property No. 1 will therefore be sold subject to the prior lien of defendant 13. We also uphold the order of the District Judge that this property will be put up for sale after the other properties mentioned in the decree are sold.

Atkinson, J.—I agree.

V.S./R.K.

Appeal allowed.

(1) [1884] 10 Cal. 1035=11 I. A. 126 (P. C.).

(2) [1911] 35 Mad. 642=11 I. C. 865.

(3) [1889] 6 Cal. 523.

A. I. R. 1919 Patna 54

JWALA PRASAD, J.

Shambehari Singh and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 359 of 1917, Decided on 21st November 1917, from order of the Deputy Magistrate, Palamau, D/- 16th August 1917.

(a) Criminal P. C. (1898), S. 419—Appeal under—Before appeal can be summarily dismissed opportunity must be given to appellant to be heard—Petition of appeal adjourned—Notice of adjournment must be given to appellant.

Before an appeal presented under S. 419 can be dismissed summarily, the appellant is entitled to a reasonable opportunity for being heard in support of his petition. Therefore when a petition of appeal is adjourned to another date, notice of the adjournment should be given to the appellant.

[P 55 C 2]

(b) Criminal P. C. (1898), S. 421 (1)—Appellate Court must peruse petition of appeal and judgment appealed against and then if it thinks that there was no ground for interfering it may dismiss appeal summarily.

Clause (1), S. 421 requires that the appellate Court shall peruse the petition of appeal and the judgment appealed against, and then if it considers that there is no ground for interfering, it may dismiss the appeal summarily. The order of the appellate Court should show on the face of it that the Court had conformed to the requirements of the section to enable the revisional Court to find out whether the appeal was judicially disposed of.

[P 56 C 1]

(c) Criminal P. C. (1898), S. 423—Duty of Court to go through record is irrespective of whether appellant appears or does not appear.

The duty imposed upon an appellate Court by S. 423 to go through the record is irrespective of whether the appellant appears or does not appear. If the appellant or his pleader appears, the Court is bound to hear him and then dispose of the appeal. If the appellant or his pleader does not appear, the Court is bound to go through the record and the judgment of the lower Court and then to decide the appeal on merits.

[P 56 C 1]

G. C. Pal—for Petitioners.

Judgment.—This is an application against an order of the Deputy Magistrate of Palamau, dated 16th August 1917, summarily rejecting an appeal preferred by the petitioners to the Deputy Commissioner of Palamau. The petitioners were convicted by a Deputy Magistrate for offences under Ss. 143 and 379, I. P. C. An appeal against the conviction was preferred by the petitioners to the Deputy Commissioner. The appeal was filed on 23rd July 1917. On the petition of appeal there is a note at the top of it: "Put up before the Deputy Commissioner, Deputy Magistrate on 23rd July 1917." This note has not been signed by any Deputy Magistrate. This may perhaps be the reason why the appeal petition was not put up to the Deputy Commissioner until 16th August 1917, almost three weeks after it was presented to the Deputy Magistrate. In the order sheet the first order in the

column of date has got the entry 25-7-1917

16-8-1917. It obviously means that the petition was filed on 25th July and was taken up on 16th August 1917. The reason for the delay is not at all obvious from the record. It is not known whether it was at all notified to the appellants or their pleader that the petition of appeal would be taken up on 16th August. The Deputy Commissioner did not himself dispose of the appeal; he made it over to Babu Hira Lal Banerji, Deputy Magistrate for disposal. This order apparently is under S. 407, Cl. (2), under which the District Magistrate or the Deputy Commissioner, as in this case, is authorised to direct that an appeal preferred under S. 407 (1) may be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals. On that very day, namely, 16th August when the petition was made over to the Deputy Magistrate for disposal, the Deputy Magistrate passed the following order:

"Parties not present nor the pleader for the appellants whom I sent for. Appeal summarily rejected."

The order does not show under what section of the Criminal Procedure Code the appeal was summarily rejected. S. 421 is the only section which gives power to an appellate Court to "summarily dismiss" an appeal.

The reason given by the Deputy Magistrate for summarily rejecting the appeal is that the petitioners and their pleader did not appear. Cl. 2, S. 421 provides that no appeal presented under S. 419

"shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same."

All the High Courts agree that an appellant is entitled to a reasonable time, after presentation in order to be heard in support of his petition. It follows therefore that when the petition of appeal is adjourned to another date, notice of it should be given to the appellant. In this case as I have shown above, the petition was not considered on the date on which it was presented, but it was taken up three weeks after and no notice appears to have been given to the petitioners of the date fixed for the hearing. The petitioners in their petition filed in this Court have denied any knowledge or

information of the date on which their appeal was rejected by the lower appellate Court. There is nothing to show that the petitioners were given a reasonable opportunity of being heard in support of their appeal. I therefore hold that no such opportunity was given at all to the petitioners or their pleader. Again Cl. (1), S. 421 requires that the appellate Court shall pursue the petition of appeal and the judgment appealed against and then if it considers that there is no ground for interfering, it may dismiss the appeal summarily. In my opinion the order of the lower appellate Court should show on the face of it that the Court had conformed to the above requirements of the section to enable the revisional Courts to find out whether the appeal was judicially disposed of. The order in question does not pretend to have done so.

If the first order of the Deputy Commissioner be construed or was meant to be an order admitting the appeal, the second order passed by the Deputy Magistrate to whom it was made over for disposal would be an order under S. 435, Criminal P. C. In order to give jurisdiction to a Magistrate to pass an order under S. 423, notice under S. 422 is required to be given to the appellant. That has not been done in this case. Then on the date fixed the Court is to peruse the record; and can dismiss the appeal only when it considers that there is no ground for interference with the judgment of the first Court. The duty imposed upon the Court to go through the record and to satisfy itself is 'irrespective of whether the appellant appears or does not appear. If the appellant or his pleader appears, the Court is bound to hear him and then dispose of the appeal. If the appellant or his pleader does not appear, the Court is bound to go through the record and the judgment of the lower Court and then to decide the appeal on merits. Whether the order therefore of 16th August 1917 of the Deputy Magistrate is on order under S. 421 or S. 423, the order is bad and should be set aside. I therefore direct that the appeal be remanded to the Deputy Commissioner in order to dispose of it according to law after giving an opportunity to the appellant or his pleader to be heard in support of the appeal.

V.S./R.K.

Appeal remanded.**A. I. R. 1919 Patna 56**

CHAMIER, C. J. AND SHARFUDDIN, J.

Tanha Singh and others—Plaintiffs—Appellants.

v.

Bandhu Singh and others—Defendants—Respondents.

Second Appeal No. 460 of 1916, Decided on 26th May 1917, from decision of Addl. Dist. Judge, Patna, D/- 16th February 1916.

Evidence Act (1872), S. 35—Hissawari prepared under S. 30, Bengal Land Registration Act, is admissible having been made by a person by whom it is signed.

A hissawari prepared in consequence of a demand made by the Collector of a district under S. 30, Bengal Land Registration Act, is inadmissible in evidence under S. 35, Evidence Act. It is not a public or other official book, register or record, but is merely the record of information supplied by some of the sharers in an estate and can only be admitted in evidence, if it is proved to have been made by the person or persons by whom it is signed. [P 57 C 2]

Hassan Imam and Gangadhar Das—for Appellants.

Manuk Gupta and Surendra Mohan Das—for Respondents.

Chamier, C. J.—(15th March 1917).—This appeal arises out of a suit brought by the plaintiffs for possession of about 18 bighas of land. Without going into fractions of a bigha, it may be said that the plaintiffs claim to be entitled to 6 bighas on the ground that 36 bighas more or less belong to one Chulhan Singh, a distant relative of his; that Chulhan Singh died and his heirs were the plaintiff Tanha Singh and Lakhan Singh, the father of the defendants. According to law, Tanha Singh and Lakhan Singh were each entitled to half of the property of Chulhan, that is to say, to 18 bighas more or less, but Tanha Singh alleges that he defrayed two-thirds of the cost of some litigation which took place between himself and Lakhan on the one side and a lady, who put herself forward as a daughter of Chulhan Singh, on the other and therefore he became by agreement with Lakhan Singh entitled to two-thirds of Chulhan's property instead of one-half. He has obtained one-half, that is, 18 bighas, and he claims with his sons to be entitled to 24. On this account therefore they claim 6 bighas. The other 12 bighas in suit were admittedly the property of one Hanuman Singh on whose death they passed into the possession of his widow Mt. Degnu Kuer. The plaintiffs' case is

that Mt. Degnu Kuer died in 1310 F., and that at that time the plaintiff Tanha Singh was solely entitled as reversionary heir of Hanuman Singh. The plaintiffs allege that Lakhan Singh died in 1309 F., that is one year before the death of Mt. Degnu. The defendants, the sons of Lakhan, with reference to the claim to the 6 bighas, deny that there was any such arrangement as was alleged by the plaintiffs. With regard to the claim to the 12 bighas they say that their father Lakhan Singh was alive when Mt. Degnu Kuer died and that the property which she had held devolved in equal shares upon the plaintiff Tanha Singh and Lakhan Singh. The Subordinate Judge decreed the claim in full. The defendants appealed. As the District Judge observes at the beginning of his judgment, the plaintiffs, in order to succeed, have to establish two propositions, namely, (1) that Lakhan predeceased Mt. Degnu Kuer and (2) that the plaintiff Tanha Singh obtained two-thirds of Chulhan's property against one-third taken by Lakhan Singh. With regard to the claim for the 6 bighas the District Judge describes the story told by the plaintiffs as a trumped up story and he gives solid reasons for arriving at the conclusion that the plaintiffs failed to make out the alleged arrangement with Lakhan. I can see no reason why we should not accept the District Judge's finding upon this part of the case.

The learned Judge, when dealing with the plaintiffs' claim for the 12 bighas, relied strongly upon a hissawari said to have been filed in the Collectorate in 1309 F. The Subordinate Judge rejected the hissawari. He refused to accept the statement of the patwari to the effect that it had been signed by all the maliks and he seems to have accepted the statement of the plaintiff Ramdhan Singh that he did not sign the hissawari. The District Judge does not refer to the evidence adduced to prove the hissawari, but he says that the hissawari is a reliable piece of evidence and that it must carry great weight as it came into existence before the dispute between the parties broke out. He refers to the fact that the Subordinate Judge had rejected the hissawari because it had not been signed by the maliks, and goes on to say that he is not concerned with deciding whether the hissawari is binding upon the plaintiff or

any other persons but what he is concerned with is, the existence of a particular person in a particular year and that this is established by the hissawari. In this Court it is contended that the hissawari was not admissible in evidence, first, because it was not proved and secondly, because if not proved, it was not admissible as a public document. Mr. Manuk, on behalf of the defendants-respondents, contended that the document was admissible under S. 35, Evidence Act. It appears to me that we should be putting a great strain on that section if we were to hold that the hissawari was admissible under it. It seems to have come into existence, in consequence of a demand made by the Collector under S. 30, Land Registration Act, 1876. The hissawari does not appear to me to be a public or other official book, register or record. So far as it is admissible or useful in the present case, it is merely the record of information supplied by some of the sharers in an estate on the demand of the Collector. I would not admit this document under S. 35. It appears to me that it would certainly be admissible if it were proved to have been made by the person or persons by whom it is said to have been signed and I think that, before making use of the document, the District Judge should have examined the evidence to see whether the hissawari was proved. Mr. Hasan Imam maintains also that the District Judge has overlooked a number of receipts which were filed in the case. Mr. Manuk, on the other hand, says that he relies strongly on the receipts himself. The receipts may not be of much value in the case but I think that they should have been discussed by the District Judge. Under the circumstances, I am of opinion that we ought not to accept the finding of the District Judge on the question whether Lakhan, the father of the defendants, predeceased Mt. Degnu Kuer. I would direct that the record be returned to the Court of the District Judge in order that a fresh finding may be recorded by him on the question whether Lakhan predeceased Mt. Degnu Kuer. No further evidence should be taken. On return of the findings ten days will be allowed for objections.

Sharfuddin, J.—(15th March 1917).
—I agree.

Judgment.—In our order of 15th March last we directed that the record

in this case should be returned to the Court of the District Judge in order that a fresh finding might be recorded on the question whether Lakhan predeceased Mt. Degnu Kuer. The learned District Judge, on a consideration of the evidence, finds as a fact that Mt. Degnu Kuer predeceased Lakhan Singh. The plaintiffs, in order to succeed, had to prove that Lakhan predeceased Degnu Kuer and that the plaintiff Tanha Singh obtained two-thirds of Chulhan's property against one-third taken by Lakhan Singh. The second question was disposed of by us in our previous order and the present finding of the District Judge is fatal to the claim of the plaintiff-appellant. No one appears to support the appeal today. The appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1919 Patna 58

MULLICK AND JWALA PRASAD, JJ.

Charu Sila Dasi—Petitioner.

v.

Haran Chandra Mukherjee and others
—Opposite Parties.

Civil Revn. No. 171 of 1918, Decided on 18th February 1919, from decision of Sub-Judge, Chota Nagpur.

(a) Civil P. C. (1908), O. 33, Rr. 4, 5, 6 and 7—Court has power to take evidence upon any matter specified in R. 5.

It is fully competent for a Court to take evidence under Rr. 6 and 7, O. 33, upon any of the matters specified in R. 5 of the order and to decide upon those matters to the best of its ability.

[P 59 C 1]

* (b) Civil P. C. (1908), O. 33, R. 1—Benamidar cannot be permitted to sue as pauper.

The provisions of O. 33 have been designed in aid of bona fide litigants and must be strictly confined to such litigants. It cannot have been the intention of the legislature that a litigant fully able to comply with the terms of the fiscal law should by setting up a pauper as his nominee, be entitled to evade the claims of the State. The effect of permitting a benamidar to sue as a pauper would be to give a person who is not a pauper the right to evade the fiscal law, and to infringe the provisions of R. 5 (e), O. 33.

[P 59 C 2]

Sailendra Nath Palit—for Petitioner.

Siva Saran Lal, Atul Krishna Ray, Prafulla Chandra Bose and Nava Kumar Chaudhury—for Opposite Parties.

Mullick, J.—This is an application for revision of an order made by the Subordinate Judge of Chota Nagpur refusing leave to the petitioner to sue as a pauper under O. 33, Civil P. C. The petitioner alleges that she has lent money to the defendants upon a partnership. She sues

the defendants for damages for the rescission of that contract. The Subordinate Judge does not appear to have examined the plaintiff under O. 33, R. 4, but appears to have straightaway embarked upon an inquiry under O. 33, R. 6, not only upon the question of pauperism, but also upon the points referred to in R. 5. As a result of that inquiry after examination of witnesses the Subordinate Judge came to the conclusion that it was not necessary to determine whether or not the plaintiff was a pauper. He found that the plaintiff was a benamidar for her husband who was a clerk in Government service and that therefore the allegations in her plaint showed no cause of action. The petitioner now asks us to interfere under S. 115, Civil P. C., alleging that the Court has exceeded its jurisdiction or exercised its jurisdiction in a materially irregular manner by going into the question whether the petitioner was a benamidar. It is contended by the learned vakil for the petitioner that the Court was only entitled to determine, upon a perusal of the plaint and an examination, if necessary, of the petitioner herself, whether or not the disqualification under Cl. (d), R. 5, was established, and that the Subordinate Judge had no jurisdiction to engage in an elaborate inquiry as to the merits of the plea of benami raised by the defendants. Reliance is placed by the learned vakil upon *Gopal Chandra Neogy v. Bigoo Mistry* (1), where their Lordships of the Calcutta High Court observed as follows with reference to an order made by a Court under somewhat similar circumstances:

"What he does really is that he applies a course of inquiry to the matter he had to investigate under S. 407 which was not applicable to it, and he thereby fails to apply to the matter a course of inquiry which was applicable. If he had confined his inquiry to the allegations as made in the plaint, and if he had said that those allegations do not show a right to sue, it is extremely doubtful whether this Court could interfere with his order under S. 622, however wrong that order might be. But he does not do so; rather he introduces considerations which are entirely foreign to the inquiry which he was called upon to make, and upon those considerations he holds that the allegations in the plaint do not show a right to sue."

The learned vakil next relies upon *Govindasami Pillai v. Municipal Council, Kumbakonam* (2). In this case their

(1) [1904] 8 C. W. N. 70.

(2) [1918] 41 Mad. 620=45 I. C. 95.

Lordships of the Madras High Court do not cite any authority for the proposition that O. 33, R. 5, does not contemplate that the Court shall go into a question of limitation to see if the petitioner has a subsisting cause of action. Indeed their Lordships appear to have overlooked a decision of their own Court, *Amirtham v. Alwar Manikkam* (3), which decides the contrary. R. 7, O. 33, clearly enacts that the Court shall hear arguments, if the parties so desire, on the question whether upon the face of the application and of the evidence (if any) taken by the Court the application is, or is not subject to any of the prohibitions specified in R. 5. In other words, it is fully competent for a Court to take evidence under Rr. 6 and 7 upon any of the matters specified in R. 5 and to decide upon those matters to the best of its ability. In support of what the law so clearly enacts the learned vakil for the opposite party cites *Kamrakh Nath v. Sundar Nath* (4), which follows the earlier case of *In the matter of Gunga Dass Adhikaree* (5). It is clear therefore that the contention that the Court had no jurisdiction to investigate the question of benami by taking evidence cannot be sustained.

Then it is urged that even though the Court had the power so to do, the Court has not in so many words found that the petitioner was a benamidar for her husband. Now, it is true that the finding is not very happily worded but upon a reading of the whole of the judgment of the learned Subordinate Judge, I have no possible doubt that he has found that the petitioner is a benamidar. It is next contended that even if she is a benamidar the decision of the learned Subordinate Judge that she has no right to sue, is wrong in law. It is not necessary for our purposes to go into the question whether a benamidar is entitled in all cases to sue upon a money debt. It is sufficient to say that the Subordinate Judge had jurisdiction to decide the question and if he has decided it wrongly that is a matter which does not give the petitioner a right to come to us under S. 115, Civil P. C. The Court had jurisdiction to decide rightly as well as wrongly and if unfortunately he has decided wrongly, that does not in any way

affect his jurisdiction. This was also the view taken in *Kamrakh Nath's* case (4) cited above.

There is finally a further reason why the petitioner should not be allowed to succeed. If the petitioner is a benamidar the effect of permitting her to sue as a pauper will be to give a person, who is not a pauper, the right to evade the fiscal law. That cannot be the intention of the statute. The statute has been designed in aid of bona fide litigants and must be strictly confined to such litigants. It cannot have been the intention of the statute that a litigant, fully able to comply with the terms of the fiscal law, should by setting up a pauper as his nominee, be entitled to evade the claims of the State. Indeed R. 5, O. 33, does make a provision for cases of this kind. Sub-Cl. (e) of that rule enacts that if the petitioner has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in that subject, then he will not be allowed to avail himself of the benefits of the rule. Here the petitioner has by implication made an agreement with her husband with reference to the subject-matter of the suit and therefore the principle of sub-Cl. (e) must apply. For all these reasons the decision of the Subordinate Judge seems to be correct and the application must be dismissed with costs, hearing fee two gold mohurs.

Jwala Prasad, J.—I agree.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 59

JWALA PRASAD, J.

Mohan Sahu and others—Defendants—Appellants.

v.

Saguni Singh and others—Plaintiffs—Respondents.

Second Appeals Nos. 2326 and 2819 of 1915 and 279 of 1916, Decided on 28th November 1916, from decision of Dist. Judge, Gaya.

(a) **Bengal Tenancy Act (1885), S. 70**—Order passed under jurisdiction properly vested is not ultra vires for small irregularities in procedure.

An order passed under S. 70 under a jurisdiction properly vested cannot be said to be ultra vires for want of proper adherence to the small regularities in the procedure prescribed for the exercise of that jurisdiction. [P 61 C 2]

(3) [1904] 27 Mad. 87.

(4) [1893] 20 All. 299.

(5) [1870] 14 W. R. 281.

(b) Bengal Tenancy Act (1885), S. 70 — Order under S. 70 is final.

An order passed under S. 70 is final under Cl. 5 of the section and cannot be questioned in a civil Court. [P 61 C 2]

Kulwant Sahay and Rajendra Prasad —for Appellants.

Amir Hossain—for Respondents.

Judgment.—The appellants in these cases are the landlords of a village called Suja Karma, Mahal Unsu, District Gaya. The respondents are tenants in the said village. The appellants as landlords applied to the Subdivisional Officer of Aurangabad under Ss. 60 and 70, Ben. Ten. Act, for the appraisement of the crops of the defendants-respondents. The Subdivisional Officer of Aurangabad, on 23rd December 1913, directed one Nowratna Panday, an officer of his Court to apprise the crops as prayed for by the appellants. He also ordered for a notice to issue on the opposite party to file objections, if any, by 3rd January 1914. This notice was served upon the plaintiffs on 24th December 1913. The officer deputed appraised the crops on the locality on 25th December 1913, and on 3rd January 1914, the date fixed in the case, filed the appraisement papers with his report. On that very day the tenants plaintiffs filed their objections to the appraisement. The subdivisional officer by his order of 3rd January accepted the appraisement papers and directed that a decree be prepared accordingly.

The respondents filed the suit before the Munsif of Aurangabad on 28th January 1914. The main contention, among others, of the plaintiffs was that the order of 3rd January and the decree passed on the basis of the said order were altogether without jurisdiction. The learned Munsif accepted this contention of the plaintiffs and held that the proceedings adopted by the subdivisional officer for appraisement and the decree were ultra vires. The District Judge in appeal upheld this view of the first Court and dismissed the appeal of the present appellants. The appellants therefore have come to this Court in appeal and contend that the order of the learned Court below is wrong and that the civil Court had no jurisdiction to set aside the order of the Collector passed under Ss. 60 and 70, Ben. Ten. Act. Reliance is placed upon Cl. 5, S. 70 of the said Act which runs as follows :

"The Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a civil Court, but subject as aforesaid, his order shall be final and shall on application to a civil Court by the landlord or the tenant be enforceable as a decree."

This clause obviously contemplates the finality of all orders passed by the Collector under S. 70. The reason given by the learned Court below for setting aside the order and the decree under S. 70 made by the subdivisional officer may be given in his own words:

"On the other hand I do not see how the appellant can contend that the provisions of S. 70, Ben. Ten. Act, were observed. The provision that the party shall be heard upon the report seems to me to be a condition precedent to a legal order passed under that section. As the learned Munsif has shown, and he is supported by the documentary evidence, the plaintiff had no opportunity of being heard upon the report. The report was put in Court and at once accepted although it was of a nature which required particular reasons."

The sole ground therefore upon which the learned District Judge has held that the order of the Collector under S. 70 was without jurisdiction, is that under Cl. 4, S. 70, no opportunity was given to the plaintiffs of being heard with regard to the appraisement made by the amin or the officer deputed by the subdivisional officer. The documents referred to as supporting the District Judge in his view that the plaintiffs were not given an opportunity have not been mentioned by the District Judge in his judgment, but from the judgment of the Munsif it is clear that these documents are the order of the subdivisional officer dated 3rd January 1914 and the notice Ex. E-2 that was served upon the plaintiffs-respondents. The notice was served upon them as already said above, on 24th December 1913 and it was intimated by that notice that 3rd January 1914 was fixed for the hearing of the case and for any objection that they might make to the appraisement being made. As a matter of fact in accordance with the notice the respondents did appear on 3rd January 1914 and did file their objections both as to the right of the landlord to appraise the crops and as to the actual estimate made by the officer deputed for the appraisement. The first document relied upon by the Court below is an order of the subdivisional officer which it is well to give in full here as the contention of the parties mainly centres round this order:

"Date 3rd January 1914. Heard parties following the decision of settlement authorities. I

decide that the lands are held on batai system. As however it appears from the amin's report that the tenants have removed the greater portion of the crop and that in the circumstance a division would be very unfair to the maliks, I order that the danabandi made by the amin be accepted. Prepare decree at 5½ paseris kutchra per rupee."

I cannot for a moment conceive that upon this order it is possible at all to contend that no opportunity was given to the plaintiffs-respondents to be heard in this case or to prefer their objections with regard to the danabandi made by the officer deputed to make it. The opening words of the order "Heard parties" are conclusive to show that opportunity was given and that they were actually heard. It is contended that they were heard only upon the right of the landlord to apply for appraisal and not as regards the actual appraisal made by the officer. We cannot go into details of what actually were the submissions made by the respondents before the subdivisional officer, but it is significant that the order approving of the appraisal is the order contained in one order only of 3rd January and that order follows the words "Heard parties." It is therefore obvious that the parties were heard on all the points that they wanted to be heard on. At any rate that was the date fixed for the danabandi papers to be filed and considered by the Court, notice whereof was already given to the plaintiffs-respondents on 24th December 1913. We have nothing on the record or in the documents relied upon by the Court below to show that they were not heard and that no opportunity at all was given. In the face of the order referred to above of 3rd January, it is impossible to say that no opportunity was given to them. I think it must be presumed that the subdivisional officer did give an opportunity to the respondents to be heard. A presumption should be made of the regularity of the proceedings of the subdivisional officer. I therefore think that the Court below was in error in holding that no opportunity was given to the respondents to be heard against the appraisal made by the officer.

But suppose for the sake of argument that no opportunity at all was given it would amount to nothing more than irregularity in the proceedings of the Collector for the appraisal of the crops.

An irregularity of this kind cannot take away the jurisdiction vested in him by the statute, and I think that it is now settled law that an order passed under a jurisdiction properly vested cannot be said to be ultra vires for want of proper adherence to the small regularities in the procedure prescribed for the exercise of that jurisdiction. It is needless to cite authorities on the point. It is not at all disputed by the respondents, and as a matter of fact, it has been held by the Courts below, that the Subdivisional Officer of Aurangabad had jurisdiction to make the order passed by him on 3rd January accepting the appraisal made by the amin and directing the preparation of that decree on the basis thereof. The order of 3rd January was therefore an order within the powers vested in him by S. 70 and is final under Cl. 5 of the section and cannot be questioned in a civil Court. The District Judge is wrong in holding that the order of the subdivisional officer under S. 70 was without jurisdiction and in decreeing the suits of the plaintiffs. I therefore allow the appeals with costs. The suits are dismissed with costs throughout.

V.S./R.K.

Appeals allowed.

* A. I. R. 1919 Patna 61

MULLICK AND JWALA PRASAD, JJ.

Abhey Ram Jha—Petitioner—Appellant.

v.

Kandarp Narayan Jha and others—Opposite Parties—Respondents.

Miscellaneous Appeals Nos. 114 and 287 of 1918, Decided on 26th March 1919, from decision of Sub-Judge, Darbhanga.

* Civil P. C. (1908), O. 9, R. 13—(Per *Mullick, J.*)—R. 13 assumes that defendant was party on record against whom valid decree was passed—Minor defendant applying under that rule therefore cannot allege that no guardian ad litem was appointed for him—(*Jwala Prasad, J. contra.*)

Per *Mullick, J.*—O. 9, R. 13, which relates to the setting aside of ex parte decrees, assumes that there was a party upon the record against whom a valid decree has been made and is binding. It is a special provision laying down a summary procedure for setting aside decrees which are valid but which have been obtained by some irregularity or suppression in the service of the necessary summons. [P 64 C 1]

Where however in a proceeding under O. 9, R. 13, a minor defendant alleges that no legal guardian was appointed, that is tantamount to a plea that he was not impleaded in the suit, and that the decree was made against a person who

was not upon the record. Such a plea is therefore not open to an applicant under the rule.

[P 64 C 1]

Per Jwala Prasad, J.—A regular suit does not lie to set aside a decree ex parte on the mere ground of nonservice of summons, but where a decree ex parte is alleged to have been obtained by a plaintiff by fraud, the defendant is entitled, besides the remedies provided for in O. 9, to institute a regular suit to set aside the decree on the ground of fraud. The fact that the defendant can get his redress by means of a suit does not in itself bar his availing himself of the remedy provided for in O. 9, R. 13, of the Code, provided he satisfies the conditions laid down in the rule.

[P 65 C 1]

It is too wide a proposition to lay down that O. 9, R. 13, implies a valid decree; for a defendant is always entitled to show that an ex parte decree was obtained against him by means of surreptitious or fraudulent service of summons although it was made to appear to the Court under O. 9, R. 6, that the summons was duly served.

[P 66 C 1]

Although on the face of a decree it appears that it is proper and valid the defendant in applying under R. 13, O. 9, to set it aside can show that the Court was misled by fraud in passing the decree.

The words "sufficient cause" in O. 9, R. 13, would bring a case within the purview of the rule if the defendant can show that there was no appointment of a guardian or that there was some defect in the appointment which prevented him as a defendant from appearing in the suit.

[P 66 C 2]

S. Sinha, Murari Prasad and Krishna Sahay—for Appellant.

Kulwant Sahai, Rajendra Prasad, Siveswar Dayal and Bimla Charan Sinha—for Respondents.

Mullick, J.—These two appeals arise out of two decrees obtained by Kandarp Narayan Jha against a mortgagor named Anrudh Prasad Singh and against three second mortgagees named Nand Lal Jha, Mahindra Jha and his nephew Abhey Ram Jha. It appears that Kandarp Narayan took two mortgages of the properties Tauzi No. 10066 and Tauzi No. 280 on 7th June 1897 and 20th November 1897 respectively from Anrudh Prasad. Thereafter a second mortgage in respect of both properties was executed by the mortgagor in favour of Lakshmidat, the predecessor-in-interest of Nand Lal Jha, Mahendra and Abhey Ram who was the son of Narain Prasad's brother Nand Lal.

The second mortgagees brought their suit first, namely, on 24th May 1905 and obtained a preliminary decree. Then on 26th December 1903 the first mortgagee brought two suits upon their two mortgages impleading Nand Lal, Mahendra and Abhey Ram as defendants 7, 8 and 9

and on 26th January 1906 Nand Lal Jha was appointed guardian ad litem of Abhey Ram, who was found to be a minor. It is alleged that the service of the notice necessary for the appointment of a guardian according to law was made on 13th December 1905 and that the summons in the suit was served upon the minor defendant on 13th January 1906. The decree was obtained on 18th April 1906 and Tauzi No. 10066 was brought to sale on 15th June 1910. The sale was confirmed on 23rd July 1910, the sale certificate was issued on 23rd July 1910, the writ of delivery on 22nd September 1910 and possession given to the decree-holder on 21st October 1910.

Meanwhile nothing appears to have been done upon the decree of the second mortgagees till 25th April 1912, when the first execution was taken out. For some reason which has not been disclosed, that execution proved infructuous, and the application was struck off on 28th May of the same year. The second execution was taken out on 1st April 1915. Tauzi No. 10066 was brought to sale on 17th January 1916 and the delivery of possession was attempted on 12th January 1917. Resistance was offered on behalf of the first mortgagee with the result that delivery of possession could not be made. Abhey Ram, who had in the meantime attained majority in 1908 thereupon filed two applications on 6th March 1917 alleging that the decrees obtained by mortgagee 1 upon his two mortgages in Suits Nos. 98 and 99 of 1906 had been obtained without service of summons upon him and that he was therefore entitled under O. 9, R. 13, Civil P. C., to have these decrees set aside. He alleged that he became aware of the existence of these decrees on 15th February 1917 and that limitation, which is 30 days in this case, began to run against him from that date.

The Subordinate Judge took evidence and found, firstly, that the petitioner became aware of the decrees long before the date alleged by him and that the applications were barred by limitation. Secondly, he found upon the merits that the summonses in the suits were regularly and duly served and that the petitioner was not entitled to invoke the aid of O. 9. Thirdly, he found that the necessary notices were duly served and that Nand Lal Jha was a legally appointed

guardian. Fourthly, he found that the petitioner was joint in property with Nand Lal Jha up to 1318 F.S., which corresponds to 1911, and that there was therefore no reason why the interest of Nand Lal Jha at the time of the suits should have been adverse to that of the petitioner.

It was contended before the learned Subordinate Judge that even if the appointment of Nand Lal Jha had been made according to law, he was a person whose interest it was to collude with the plaintiff for the purpose of defrauding the petitioner. It was suggested in fact that the omission on the part of Nand Lal Jha and Mahendra Jha, who were adults at the time of the decrees, to make any petition for the restoration of the case indicates that they were in collusion with mortgagee 1 for the purpose of defrauding their minor nephew. Against the decision of the learned Subordinate Judge dismissing the applications for restoration the petitioner Abhey Ram prefers the present two appeals, viz., Nos. 114 and 287 of 1918. Mr. Sinha appearing on behalf of the appellant contends that the learned Subordinate Judge has committed an error of fact in finding that the date of the petitioner's knowledge was not 15th February 1917. The Subordinate Judge has relied upon the proceedings in execution of the two decrees obtained by mortgagee 1. He has also relied upon the proceedings in the second execution of the appellant's own decree, namely, in the execution case which was instituted on 1st April 1915, and from these items of evidence he has drawn the inference that the fact that the property No. 10066 was sold so far back as 1910 must have been and was known to the petitioner. It is necessary to remember in this connexion that the petitioner attained majority in 1908 and that at the time of the suit he was about 16. It is difficult to believe that he was ignorant of the sales and the proclamations relating thereto and the delivery of possession in connexion with the decree obtained by the first mortgagee. Then there is also an important piece of evidence, namely, Ex. D, which is an application made in the petitioner's own execution asking that in addition to the mortgaged properties certain other properties belonging to the judgment-debtors should be brought to sale. From this application

the learned Subordinate Judge has drawn the inference that the petitioner, knowing that the mortgaged properties had been already sold and would fetch nothing at the second sale, was anxious to bring to sale other properties belonging to the judgment-debtors. Mr. Sinha on the other hand contends that the petition does not necessarily warrant this inference and that it is equally possible that the applicant for the sake of greater caution desired to bring to sale properties other than the mortgaged properties. Now the inference to be drawn must depend upon the balance of the evidence in the case. In my opinion the learned Subordinate Judge was right, in view of the other evidence in the case, in coming to the conclusion that the second mortgagees would not have asked for the sale of other properties if they had not been aware that the mortgaged properties had already been sold.

In my opinion the balance of evidence is in favour of the inference drawn by the learned Subordinate Judge. Therefore at the outset it would seem that the applications for restoration are barred by time. On going next into the merits it seems to me that the opposite party, the respondents, have a still stronger case. The first question is, whether or not, the petitioner can in a proceeding under O. 9, R. 13, attack the legality of the appointment of Nand Lal Jha, that is to say, whether he is at liberty to show that Nand Lal Jha was appointed without any service of the notices required by law.

It may be conceded that although the provisions of O. 32 of the present Civil P. C., are more rigorous with regard to the service of notice upon the proposed guardian, the minor and the natural guardian, the law as interpreted in judicial decisions was substantially the same under the older Code. But it seems to me that if the petitioner desires to attack the validity of the appointment of Nand Lal Jha then he cannot avail himself of the provisions of O. 9, because the foundation of O. 9, is that a valid decree has been passed against the defendant. If the defendant alleges that there was no legal guardian appointed, then that is tantamount to a plea that he was not impleaded in the suit, and that the decree was made against a person who was not upon the record.

In that case the decree must be treated as a nullity and the only remedy, if any, is a declaration by a regular suit. O. 9, which relates to the setting aside of ex parte decrees, assumes that there was a party upon the record against whom a valid decree has been made and is binding.

It is a special provision laying down a summary procedure for setting aside decrees which are valid but which have been obtained by some irregularity or suppression in the service of the necessary summons. In my opinion the contention of the respondents before us that in this proceeding it was not open to the petitioner to challenge the legality of the appointment of Nand Lal is well founded. But assuming that it was open to him to raise the question, I agree with the respondents that the evidence is sufficient for the purpose of showing that the notice upon Nand Lal was duly and properly served. On this point the peon, Sheo Nandan Singh, has been called and deposes that he did serve the notice upon Nand Lal Jha as the guardian of Abhey Ram and upon Abhey Ram himself. It is said that one Darsan Chaukidar witnessed the service. Darsan has been called by the appellant and deposes that he did not witness any such service. But on the other hand the identifier Prem Dutt deposes in favour of the respondents and the learned Subordinate Judge, after watching the demeanour of Darsan and of the witness produced by the respondents, has come to the conclusion that the balance of evidence is in favour of the respondents. He also draws attention to the fact that Darsan has not been a chaukidar of the village for eight or nine years. In my opinion there is no reason why a public servant such as the peon should be disbelieved unless there is strong and cogent reason for rejecting his evidence. I agree that the evidence as to the service of notice upon Nand Lal and Abhey Ram in connexion with the guardianship matter was sufficient. There is also the general consideration that there was no reason why the first mortgagee should suppress the service of the necessary notice, seeing that it was eminently to his interest to see that all the proceedings in connexion with his suit were regular and legal. He was concerned to get his money upon his mortgage as quickly as possible and to give the second mortgagees an opportunity

to redeem, and he must have known that any irregularity in bringing the second mortgagees upon the record was bound to land him in difficulties and future litigation.

Then as regards the service of the summons the evidence, in my opinion, is equally in favour of the respondents. The peon Rekha Rai has been called to prove the service in the two cases Nos. 98 and 99. He is supported by the identifier Nil Kantha Jha. In the peon's return it is stated that a patwari named Raghubar Lal witnessed the service. Raghubar Lal has been called by the appellant and denies that he did any such thing. The learned Subordinate Judge has declined to believe Raghubar Lal and has accepted the evidence of the peon and the identifier. I am unable, upon the evidence which has been read to us and which has been very fairly put to us by the learned counsel, to say the inference drawn by the learned Subordinate Judge was wrong and particularly so, as he had the opportunity of seeing the witnesses himself and watching their demeanour in cross-examination. In this connexion it may be noticed that one Anant Lal has deposed in favour of the appellant, similarly denying that there was any service of notice in the matter of the guardianship. The learned Subordinate Judge appears to have discarded the evidence of this witness for the same reason as that of Raghubar Lal. He thinks that these two witnesses, although apparently of a respectable class, are persons on the side of the appellant and that their evidence is not worthy of credit. It is obvious that in the case of processes served very nearly 11 years previously, direct evidence must have been difficult to obtain and it is fortunate that in this case the records were preserved and that the original notices were available to the Court. In my opinion the presumption of regularity which attaches to the proceedings of a public officer has not been sufficiently rebutted. If therefore the summons was regularly served upon the petitioner as represented by his guardian Nand Lal Jha, clearly he has no case for restoration.

With regard to the question whether or not the nature of Nand Lal Jha's interest was adverse to that of the petitioner, assuming that the matter can be adjudicated in the present proceedings,

the evidence clearly shows that the Subordinate Judge's finding that Nand Lal Mahendra and the petitioner were joint in property till 1318 F. S. is correct. This is shown by the plaint filed by the petitioner and his cosharers in their mortgage suit in 1905 as well as by the two execution applications and the vakalatnamas filed in connexion therewith as also by the petition Ex. "D," to which reference has already been made. In all these documents as also in a vakalatnama in connexion with a decree absolute filed on 11th July 1908, it is clear that the petitioner was operating jointly with Nand Lal and that his allegation that his maternal uncle was his guardian at that time cannot be accepted. It is also clear from these documents that the story of separation in 1312 and subsequent ill-feeling has been rightly disbelieved by the Subordinate Judge. The petitioners case was that in 1905, which corresponds to 1312 F. S., his mother was his guardian and that Nand Lal Jha was not joint with him and that he had no right to represent him in the suit. The plaint of 1905 shows that his mother was not in fact his guardian at that time. It follows also that in 1905 if Nand Lal was joint in food and property with the petitioner and was the head of the family, then any decree obtained against Nand Lal would bind the petitioner and that the question of irregularity in service would not arise. It also follows that if Nand Lal Jha was the karta, and if as is the petitioner's case, service was properly made upon Nand Lal, then there would be no object on the part of the plaintiff in the suit to suppress service upon the petitioner. For all reasons therefore I agree with the learned Subordinate Judge that the summons in the suit was duly and properly served. The applications were therefore rightly rejected and the appeals before us must fail, and are dismissed with costs.

Jwala Prasad, J. — The petitioner Abhey Ram Jha made an application on 6th March 1917, under O. 9, R. 13, to set aside two ex parte decrees passed on 18th April 1906 against him and his two uncles and others, alleging that he came to know of the said decrees on 15th February 1917. The grounds for this application were that (1) the ex parte decrees were passed without notice and knowledge of the petitioner in concert with

the other defendants to the suit, and (2) he was a minor at the time and no guardian was appointed for him and no notice was served upon any guardian of the petitioner and no step was taken by him or his guardian in that suit and hence the decree was absolutely illegal and ineffective and liable to be set aside. On behalf of the opposite party a preliminary objection is taken that the second ground could not be entertained under O. 9, R. 13. The contention is that if no guardian ad litem was appointed on behalf of the petitioner under O. 32, or there was any fraud in the appointment of guardian, there was no valid decree against him, whereas O. 9, R. 13, presupposes a valid decree. The second contention is that the remedy of the petitioner was only by means of a suit and not by an application under O. 9, R. 13. I do not think there is any substance in these contentions. No doubt a regular suit does not lie to set aside a decree ex parte on the mere ground of non-service of summons, but where a decree ex parte is alleged to have been obtained by a plaintiff by fraud the defendant is entitled, besides the remedies provided for in O. 9, to institute a regular suit to set aside the decree on the ground of fraud. The fact that the defendant could get his redress by means of a suit does not in itself bar his availing himself of the remedy provided for in O. 9, R. 13, provided he satisfies the condition laid down in O. 9, R. 13. The petitioner was a minor defendant in the original suits. Under O. 32 of the Code, the Court was required to appoint his guardian for the suit. This appointment is to be made either on application in the name and on behalf of the minor or by the plaintiff under O. 32, R. 3. Under R. 4 the order can be made only upon notice to the minor and to any guardian of the minor appointed or declared by a competent authority or when there is no such guardian, upon notice to the father or other natural guardian of the minor.

The object of this rule is that the minor and his guardian specified in the said rule should have notice of the proceedings instituted under R. 3 for the appointment of his guardian. Non-service of notice upon the minor or his guardian specified in the said rule would prevent the minor from appearing in the suit and getting a proper guardian appointed. The ap.

pointment of a guardian of a minor is after the institution of the suit. The plaintiff had joined the petitioner as a defendant under O. 1, R. 3, and had described him as a minor under O. 6, R. 3, read with the form prescribed in Appx. A, Civil P. C. A plaintiff, if a minor, has to file his suit describing himself as such through a next friend who must be named in the plaint; but a suit against a minor need only describe him to be a minor and need not name the guardian ad litem, for the appointment of the guardian ad litem rests with the Court. Thus the plaint is validly instituted by presenting the plaint in Court against the minor, whether the guardian of the minor was subsequently appointed or not. The minor was therefore a defendant in the suit and was a party to it. The summons in the suit is to be served upon the minor and not upon the guardian who under the law is not a party to the suit, and if the summons is served upon a guardian not properly appointed, the minor can very well say that the summons was not duly served and that he was prevented from appearing in the suit through his proper guardian and that there was sufficient cause within the meaning of R. 13 for his non-appearance.

Order 9, R. 13, requires the following conditions: (1) that the applicant must be a defendant in the suit, and (2) that the summons was not duly served or that he was prevented by any sufficient cause from appearing. There is no doubt that the petitioner was a minor and if he can show that the summons was not duly served upon him through a proper guardian whose appointment takes place after the valid institution of the suit, or that he was prevented by any sufficient cause from appearing, he would be entitled to come under the rule. I think that it would be too wide a proposition to lay down that R. 13 implies a valid decree, for a defendant is always entitled to show that an ex parte decree was obtained against him by means of surreptitious or fraudulent service of summons, although it was made to appear to the Court under O. 9, R. 6, that the summons was duly served. Although on the face of the decree it appears that the decree was proper and valid, the defendant in applying under R. 13 to set aside can show that the Court was misled by fraud in passing the decree. Besides, the

words 'sufficient cause' in the rule would well bring the present case within the purview of that rule, if the defendant could show that there was no appointment of the guardian or there was defect in the appointment of the guardian which prevented him as a defendant to appear in the suit. I therefore disagree with the view of my learned brother on this point.

Now as to the first contention of the petitioner: On merits of the case I agree with my learned brother that the application must be dismissed. The decrees were obtained upon plaints in which the petitioner was described as a minor under the guardianship of his uncle Nand Lal Jha. On 16th December 1906 the plaints were admitted and an order was passed to issue notice to the minor defendants and their guardian fixing 15th January 1906. On 16th January the order was that notice was served, that no objection was made and that the proposed guardian Nand Lal Jha be appointed guardian ad litem of the minor petitioner. Thereafter the case proceeded in the ordinary way, summonses were issued upon the defendants and ultimately on 18th December 1906 the ex parte decrees in question were passed. The petitioner and his uncles were impleaded as defendants on account of their being subsequent mortgagees in respect of the properties which were covered by the decrees sought to be set aside. To enforce their subsequent mortgage a suit was brought on behalf of the petitioner and his two uncles on 24th May 1905, and a decree was passed on 26th July 1905. In that suit the uncle of the petitioner, Nand Lal Jha, was described as his next friend. The decrees which are the subject matter of the present application were executed and the mortgaged properties were sold in 1910. Possession was delivered in the same year.

In the year 1908 the petitioner attained majority and on 11th July 1908 there appears to have been filed a joint petition on his behalf as well as on behalf of his uncles, praying for their own mortgage decree being made absolute. The execution of that decree was taken once in 1912 and subsequently in 1915, and ultimately on 17th January 1916 the mortgaged property was sold. Thus from 1908 when the petitioner attained majority upto 1916, his own mortgage decree was under execution. In order to sell the property

in execution of that decree it was incumbent upon the petitioner to ascertain the prior encumbrances upon the property, the nature of the property and various other matters connected with the property. The valuation of the property sought to be sold in execution of a decree is always fixed in consideration of the prior encumbrances and mortgages upon that property and as a matter of fact the valuation given by the petitioner in his own execution shows that the prior encumbrances were taken into account as he fixed a very low value of the property. The petitioner therefore must have come to know of the existence of the decrees on the prior mortgages in question and the sale of the property in execution of those decrees. It is impossible to conceive that the petitioner was all along ignorant of the ex parte decrees in question. From this point of view, the applications to set aside the ex parte decrees are barred by time. Apart from this there is evidence afforded by the depositions of the Court peons that the summonses in the original suits were served according to law. There is no reason to discard that evidence; nor has any motive been shown in this case which would impel the prior mortgagee to get the summonses served surreptitiously and collusively. Obviously it was not to his benefit, for it would frustrate the very object of making the subsequent mortgagees parties to the suit, namely, to give them a chance to redeem the mortgage.

Upon all these grounds I agree that the petitioner had knowledge of the decrees against him long before the time for filing the application under O. 9, R. 13, had expired. I also hold that the summonses were properly served. The application must therefore be dismissed.

V.S./R.K. *Application dismissed.*

*** A. I. R. 1919 Patna 67**

JWALA PRASAD, J.

Mt. Dhondhia and another—Plaintiffs—Appellants.

v.

Hekayat Pandey and others—Defendants—Respondents.

Second Appeal No. 687 of 1917, Decided on 5th June 1918, from decision of Dist. Judge, Chapra.

* Hindu Law—Alienation—Widow — Part of consideration not for legal necessity—

Entire sale is liable to be set aside—Purchasers are liable to account for mesne profits.

If a sale by a Hindu widow of her husband's property is partially invalid owing to want of legal necessity, the whole sale must be set aside and the purchasers are liable to account for mesne profits for the period that they have been in possession.

[P 68 C 1, 2]

Harnarain Prasad—for Appellants.

Lakshmi Narain Sinha—for Respondents.

Judgment.—The finding now remitted on second remand is that the auction sale in execution of the decree for arrears of rent which accrued after the death of Bishun was not for legal necessity. The reason given by the learned Judge for the above finding is that the Mussamat had executed a zarpeshgi deed in favour of defendants 1 to 4 for the purpose of paying up the amount of the decree in execution of which the property was sold; that the decretal amount should have been paid out of the zarpeshgi money, and that if these zarpeshgidars and the widow as between themselves failed to do so and allowed the property to be sold, it is obviously unjust that the reversioners should suffer thereby. The learned Judge also finds that the sale for the arrears of rent which accrued during the time of the lady was not legal necessity. In order to appreciate this it is necessary to mention that the zarpeshgi bond was executed on 9th July 1905, by the Mussamat, for the following purposes: (1) to pay up a prior debt of her husband's time Rs. 165; (2) to pay up the rent decree in question Rs. 55; and (3) to satisfy certain other sums due to the zarpeshgidars themselves.

Both the Courts below concurrently found that it was not proved that the zarpeshgidars paid Rs. 55 to the Mussamat for the purpose of satisfying the decree and that it was also not shown that there was any other debt of Rs. 80 due to them as mentioned in the zarpeshgi bond. Under the terms of the bond, which has been read to me, defendants 1 to 4 were to remain in possession of the properties in lieu of Rs. 300 which was advanced by them and they were to pay rent of the land to the landlord, namely, Rupees 15-13-9. The rent-decree which was obtained prior to the execution of the mortgage bond was the first charge on the property and the sale of the holding in execution of that decree was likely to prejudice the interest of the mort-

gagees themselves. It was therefore natural as the learned Judge has remarked that the zarpeshgidars would keep the money in their own hands in order to pay up the rent decree and thus to prevent any possible danger to their own mortgage interest. It was held, as already observed, that the money was not paid to the Mussamat. The auction-sale in execution of the decree therefore took place on account of the nonpayment of the money by the zarpeshgidars, either to the Mussamat, or to the decree-holders landlords. It happens in the present case that the zarpeshgidars have purchased the property from the auction-purchaser Ganga Thakur, defendant 5. They therefore occupy the combined position of auction purchasers and zarpeshgidars. The rent decree, as mentioned in the body thereof was in respect of the years 1309 to 1312 and the amount of the arrears as set out in the decree was Rs. 31-11-6. The annual rent due to the decree-holders was at the rate of Rs. 10-9-2. This means that the rent decree was in respect of rent for three years, namely, 1310 to 1312. There might be some money for 1309 also. Bishun, the husband of the lady, is said to have died in 1310 or 1311 so that the major portion, if not the entire, of the decree was due at the time of the Mussamat. The onus of proving legal necessity was upon the defendants. Nothing has been brought to my notice in the course of the argument on behalf of the respondents to show that the debt was for legal necessity, and I agree with what the learned Sessions Judge at the outset of his judgment says:

"In the present case no such other grounds have been made out."

The learned Judge therefore is right in holding that the sale of the property so far as the arrears that accrued during the time of the Mussamat are concerned was not for legal necessity and that nothing passed to the auction-purchaser except the right, title and interest of the Mussamat which, on account of her death, have ceased to exist. As shown above, the major part of the decree in execution of which the sale took place was of the time of the Mussamat and the principle laid down in the case of *Hari Kisson Bhagat v. Bajrang Sahai Singh* (1) applies. In the terms of that authority the sale being partially invalid owing to want of

legal necessity, the whole sale must be set aside and the purchasers are liable to account for mesne profits for the period that they were in possession. Defendants 1 to 4 are however in possession of the property by virtue of the zarpeshgi deed and so no question of mesne profits arises in the case, so long as Rs. 165, the amount of debt of the time of the Mussamat, husband, is not paid by the plaintiffs. The auction sale is not binding upon the plaintiffs as reversioners and the defendants have no right, title or interest in their favour by virtue of their auction purchase and the plaintiffs are entitled to possession on payment of Rs. 165. The result is that the appeal is decreed. The judgment and decree of the learned District Judge are set aside and those of the Munsif are restored. There will be no order as to costs in the circumstances of the case.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 68

DAS, J.

Kali Sahu—Defendant—Appellant.

v.

Girdhari Mistri and others—Plaintiffs—Respondents.

Second Appeal No. 1319 of 1917, Decided on 3rd April 1919, from decision of Sub-Judge, Saran (Chapra).

(a) **Transfer of Property Act (1882), S. 43—Transferor must convey to purchaser subsequently acquired title.**

The general principle underlying S. 43 is that if a person sells an estate to which he has no title and after the conveyance acquires a title he will in equity be compelled to convey it to the purchaser because as between the transferor and the transferee the transferor cannot plead a subsequent title acquired by purchase. [P 69 C 2]

(b) **Bengal Tenancy Act (1885), S. 3—Lands situated within Municipality are within scope of Bengal Tenancy Act unless excluded by Government Notification.**

Lands situated within a Municipality are within the scope of the Bengal Tenancy Act unless they are gazetted out of its operation by a notification duly published by the Local Government. [P 70 C 1]

(c) **Bengal Tenancy Act (1885), S. 103—Certificate by Revenue Officer as to publication of Record of Rights is conclusive as to publication duly made.**

Under S. 103, the certificate made by the Revenue Officer as to the publication of the Record of Rights is conclusive evidence as to the publication of the record and as to its having been duly made under Ch. 10 of the Act. [P 70 C 2]

Purnendu Narain Sinha—for Appellant.

B. N. Mitter—for Respondents.

(1) [1909] 1 I. C. 434.

Judgment.—On 16th September 1893 the appellant sold a plot of land measuring 7 cottas to the plaintiffs and to two other persons who amicably divided the plot amongst themselves, the plaintiffs getting the western portion of the land. The deed of sale executed by the appellant describes the land as bounded on the west by the khet of Dhannu Singh. The appellant alleges that this description is wrong and that between the western boundary of the land sold and the khet of Dhanu Singh there is a narrow strip of land measuring 2 cottas 19 dhurs which belonged to one Jawahir Singh and which Jawahir Singh sold to the appellant on 4th September 1904. His case is that these two cottas 19 dhurs of land did not belong to him on 16th September 1893 and that he did not purport to sell it to the plaintiffs and their co-vendees on 16th September 1893. The rival view put forward on behalf of the plaintiffs-respondents is that the appellant is conclusively bound by the recital in his own conveyance and that the disputed land in fact belonged to the appellant and was by him conveyed to the plaintiffs and their co-vendees, on 16th September 1893.

On 12th January 1901 the Record of Rights dealing with this locality was finally published and promulgated. The land admittedly sold by the appellant on 16th September 1893 is shown as plots Nos. 1307, 1308 and 1309 and in the possession of the plaintiffs and their co-vendees. The plot which is now in dispute is shown as plot No. 1306 and as belonging to Jawahir Singh. There can be no doubt whatever that the Record of Rights is completely in favour of the appellant. Subsequently there were proceedings under S. 144, Criminal P. C., between the parties which ended in favour of the appellant on 1st March 1914. On 23rd November 1915 the respondents commenced this action for adjudication of their title with respect to the aforesaid strip of land measuring 2 cottas 19 dhurs and for recovery of possession thereof. The learned Munsif who heard the case decided in favour of the appellant. His conclusions are to be found in the very able judgment which he has written. The respondents appealed and the learned Subordinate Judge who heard the appeal was of opinion that the learned Munsif had missed the real points in controversy between the par-

ties. He thought that the Munsif should have laid down two important issues which, in his opinion, arose in the case, namely, (1) whether the land lies within the Municipality. If so, whether the Settlement Khatian is operative; and (2) whether defendant 1 is estopped from setting up a right to the disputed land adversely to that of the plaintiffs. Having himself laid down these two important issues, the learned Subordinate Judge proceeded to discuss them and in the result he came to a conclusion adversely to defendant 1.

I will first of all deal with the question of estoppel. The learned Subordinate Judge is of opinion that S. 43, T. P. Act, coupled with a decision of the Calcutta High Court reported as *Krishna Chandra Ghose v. Rasik Lal Khan* (1), completely estops defendant 1 from putting forward his title to the land in dispute. The general principle underlying S. 43 is that if a person sells an estate to which he has no title and after the conveyance acquires the title he will in equity be compelled to convey it to the purchaser, because as between the transferor and the transferee the transferor cannot plead a subsequent title acquired by purchase. That is a very well-known principle of equity and is too well established to need any discussion. The case of *Krishna Chandra Ghose v. Rasik Lal Khan* (1) is founded on this principle. But what is the plaintiffs' case? It is not their case that although this narrow strip of land did not originally belong to defendant 1, still he is estopped from putting forward his subsequent title acquired since the transfer in their favour, on the ground that he in fact transferred it by his conveyance. Their case on the other hand is that this strip of land did belong to defendant 1 and that defendant 1 did convey it to them. That may be true. If true, they will be entitled to succeed not on the ground of estoppel, but on the ground that they have validly acquired a title to the disputed land by conveyance from one who had title to it. That is not estoppel, and I hold that there is no question of estoppel in this case at all.

I now pass to the first point, namely, whether the land lies within the Municipality, if so, whether the Settlement Khatian is operative. The point does not

(1) [1916] 33 I. C. 568.

seem to have been discussed before the learned Munsif, but the learned Subordinate Judge thought that the point was of importance and proceeded to deal with it. At the outset he was faced with the difficulty that there was no evidence before him which enabled him to come to the conclusion that the land in dispute did lie within the Municipality. The proper course for him in those circumstances would have been to remand the case to the Court of first instance to take further evidence if necessary and to come to a conclusion on that issue; but he took the extraordinary course of writing a letter to the Vice-Chairman of the Municipality and acting upon the reply of the Vice-Chairman to his letter. In my opinion the procedure adopted by the learned Subordinate Judge was highly irregular and led to a failure of justice. But is the Subordinate Judge right in the conclusion at which he did arrive, namely, that the revenue authorities had no jurisdiction whatever to frame and finally publish a Record of Rights in an area within a Municipality? I will assume that this area is within the Municipality. Now the solution of this question depends upon S. 1, Cl. (3), Ben. Ten. Act.

This clause provides that the Bengal Tenancy Act extends by its own operation to all the territories for the time being under the administration of the Lieutenant-Governor of Bengal, except the town of Calcutta, the Division of Orissa, and the Scheduled Districts specified in the third part of the first schedule of the Scheduled Districts Act, 1874. It is true that by Act 1, Bengal Council of 1907, this clause was amended and the amending Act provided that any area situated within a Municipality under the provisions of the Bengal Municipality Act, 1884, or part thereof, and specified in a notification in this behalf by the Local Government, should also be outside the operation of the Bengal Tenancy Act. But in 1901, when the Record of Rights in this case was published, the Municipal areas were undoubtedly within the operation of the Bengal Tenancy Act and it may be noted that they are even now by the operation of the Act itself within the scope of the Act, unless they are gazetted out of the operation of the Act by a notification duly published by the Local Government. It seems to me,

therefore that there can be no question that the revenue officers had jurisdiction to frame and publish a Record of Rights with reference to this area. In my opinion the learned Subordinate Judge erred in law in excluding from his consideration the effect of the entry in the Record of Rights. It has been urged however before me that there has in fact been no Record of Rights prepared with respect to this area. The Record of Rights is in evidence in this case and is Ex. 6. It bears the certificate of the revenue officer, which under the provisions of S. 103 (b), Ben. Ten. Act, is conclusive evidence of the publication of the Record of Rights, and under S. 103 (a), Cl. (2), the publication of the Record of Rights is conclusive evidence that the record has been duly made under Ch. 10. I do not think therefore that it is open to the respondents to argue that the Record of Rights was not prepared under Ch. 10, or that the due formalities were not complied with.

The case must therefore go back to the Court below. It must take into consideration the entry in the finally published Record of Rights, and come to a conclusion on all the evidence in the case including the entry in the Record of Rights. The appellant is entitled to the costs of this appeal. The costs of the Courts below will abide the result, and will be dealt with by the lower appellate Court.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 70

DAS, J.

Mahomed Saleh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 151 of 1919, Decided on 29th May 1919, against order of Sess. Judge, Monghyr, D/- 30th April 1919.

Criminal P. C. (1898), S. 403—Trial and acquittal on charge of kidnapping under S. 363, I. P. C.—Subsequent trial for offences under Ss. 366 and 368 is illegal.

Accused was tried under S. 363, I. P. C., and was acquitted. Upon an application by the complainant, the Sessions Judge directed fresh inquiry to be made to ascertain whether offences under S. 366 or 368 or any other section of the Penal Code had been committed by the accused:

Held: that the order directing further inquiry should not have been made, inasmuch as kidnapping is an essential element in offences under Ss. 365, 368, and the accused having already been acquitted of that offence, he could not be put on

trial twice for the same offence, nor could he be convicted under Ss. 365 or 366 or 368, unless and until the prosecution established that he had committed the offence of kidnapping. [P 71 C 2]

P. C. Manuk and Mahomed Hasan Jan
—for Petitioner.

Govt. Pleader—for the Crown.

Judgment.—I have no doubt whatever that the order of the learned Sessions Judge of Monghyr, directing fresh inquiry with a view to ascertain if offences under Ss. 366 and 368 or any other section have been committed by the petitioner before me, ought not to be allowed to stand. It appears that the petitioner was charged under S. 363, I. P. C. The charge was framed against him on 16th November 1918. On 4th December 1918 an application was filed before the Magistrate asking him to frame charges against the petitioner under Ss. 365, 366 or 368. The learned Magistrate, being of opinion that on the evidence and in the circumstances of the case charges under those sections should not be framed, refused to pass an order in favour of the complainant. There can be no doubt that the learned Magistrate, who was in possession of all the facts, had absolute power to reject the petition filed before him on 4th December 1918. This order by the learned subdivisional officer was passed on 7th January 1919. On 15th January the complainant moved the District Magistrate of Monghyr asking him to call for the record and to commit the accused to the Court of Session. This application was admittedly made under S. 435, Criminal P. C. This application was refused by the District Magistrate. The petitioner was tried under S. 363 and was acquitted by the Subdivisional Magistrate. Thereupon the opposite party made an application for fresh inquiry before the learned Sessions Judge of Monghyr and the learned Sessions Judge of Monghyr has directed that a fresh enquiry be made with a view to ascertain if the offences under S. 366 or S. 368 or under any other section have been committed by the petitioner. This application is directed against this order of the learned Sessions Judge.

The first point that has been argued before me is that the learned Sessions Judge was incompetent to deal with this matter, the same having been dealt with by the District Magistrate on 15th January. It is, in my opinion, unneces-

sary to deal with this point, because I have no doubt whatever that the learned Sessions Judge should not have directed the fresh inquiry in the circumstances of this case. Now it is admitted that kidnapping is an essential element in offences under S. 365, S. 366 or S. 368. He has already been acquitted of an offence of having kidnapped Mt. Rambatia. It is a well recognized principle that a person should not be put on trial twice for having committed the same offence. It seems to me that he cannot be convicted under S. 365, S. 366 or S. 368 unless and until the prosecution establishes that he did kidnap Mt. Rambatia. He has already been tried for that offence and has been acquitted, and in my opinion he should not be tried again for any offence of which kidnapping is an essential element. I would therefore set aside the order passed by the learned Sessions Judge of Monghyr directing fresh enquiry into this matter. No further proceedings will be taken against either of the accused.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 71

ATKINSON AND DAS, JJ.

Shaiba Prasad Manjhi and others—
Plaintiffs—Appellants.

v.

Golam Manjhi and others—Defendants
—Respondents.

Appeal No. 999 of 1917, Decided on 27th February 1919, from appellate decree of Dist. Judge, Manbhum, D/- 28th July 1917.

(a) *Chota Nagpur Tenancy Act (1908), Ss. 80, 84, 127 and 132* — Notification for preparation of Record of Rights made under S. 80—Entries are merely presumed to be correct—But when made under S. 127 entries are conclusive evidence.

If a notification for the preparation of a Record of Rights is made under S. 80, Chota Nagpur Tenancy Act, the entries in the Record of Rights so prepared are under S. 84 of the Act merely presumed to be correct until they are proved by evidence to be incorrect; but if the notification is made under S. 127 of the Act, the entries in the Record of Rights are by virtue of S. 132 conclusive evidence of the rights and obligations as between the tenants and their landlords to which the entries relate and of all the particulars recorded in such entries. [P 72 C 2]

(b) *Chota Nagpur Tenancy Act (1908), S. 132*—Rights and obligations of tenants, mean rights and obligations with reference to landlords only.

The expression "rights and obligations of tenants" in S. 132 mean rights and obligations of

tenants with reference to landlords only, so that once those rights and obligations are ascertained, they become final and are not liable to be called in question in any civil Court. Ch. 15 of the Act gives no power to the Revenue Officer to deal with questions of title between tenants claiming hostilely to each other. [P 73 C 1]

(c) **Chota Nagpur Tenancy Act (1908), S. 132—Words "of all the particulars recorded in such entries" mean particulars of rights and obligations of tenants as against and to landlords.**

Section 132 must be read consistently with the whole of Ch. 15 and with the general policy of the legislature provided therein to protect the tenants against the landlords and when so read, the words "of all the particulars recorded in such entries" must mean the particulars of the rights and obligations of the tenants as against and to the landlords. [P 73 C 1, 2]

(d) **Chota Nagpur Tenancy Act (1908), S. 258—S. 258 is no bar to suit by one set of tenants to recover joint possession of land in disputes from another set of tenants.**

The only suit or proceeding contemplated in Ch. 15 is a suit or proceeding between tenant and landlord under S. 130 of the Act, and therefore S. 258 of the Act is no bar to a suit by one set of tenants to recover joint possession of the land in dispute from another set of tenants.

Where there has been an ouster of a joint tenant, the party out of possession is competent to maintain a suit for joint possession. [P 73 C 2]

(e) **Interpretation of Statutes — Jurisdiction—Statute which purports to oust civil Court's jurisdiction must be strictly construed.**

A Statute which purports to oust the jurisdiction of civil Courts must be very strictly construed and the Courts must be specially on their guard not to allow the civil Court's jurisdiction over matters not expressly or by necessary implication taken away to be lightly interfered with. [P 73 C 1]

Atul Krishna Ray—for Appellants.

Abani Bhusan Mukherji—for Respondents.

Das, J.—The suit out of which this appeal arises was brought by the appellants for the following reliefs: (a) That it may be declared that the plots mentioned in Sch. 3 appertain to the Baraband mentioned in Sch. 1 and that the principal defendants 1 to 5 alone have no right to be in possession thereof; that it may be decided that the defendants should remove such quantity of earth from the plots as they have utilized for the purpose of filling them up and they should demolish the ridges erected thereon and bring the plots to their original state, thus making them one with the band; that the plaintiffs are entitled to get joint possession of them along with the defendants. (b) That the decree may be passed in favour of the plaintiffs against defendants 1 to 5 for Rs. 50, the

cost that will be incurred in removing the earth and cutting the ars. (c) For costs in Court with interest.

The plaintiffs' case is that the land in dispute to the extent of 1 bigha forms part of a large tank, called the Baraband, which admittedly is joint between the parties and they complain that defendants 1 to 5 have dispossessed them from this land and have had the same recorded in their names in the finally published Record of Rights. The lower appellate Court agreeing with the Court of first instance dismissed the suit on two grounds, namely: (1) That the Record of Rights was finally published under S. 128, Chota Nagpur Tenancy Act, and consequently under S. 132 of that Act, the entries are conclusive evidence of the particulars recorded therein. (2) It would be inequitable to allow the plaintiffs joint possession under the circumstances of the case.

The plaintiffs appeal and on their behalf it has been argued that the Record of Rights was published not under S. 128, Chota Nagpur Tenancy Act, but under S. 83 (2) of that Act, and consequently S. 132, has no application whatever. This contention is unsustainable. S. 128 provides that when a notification has been published under S. 127, directing the preparation of a record, the provisions of Ss. 82, 83 and 84, sub-Ss. (1), (2) and Ss. 89 to 96, so far as they may be applicable, shall apply as if such record were referred to in those sections. It appears to us that the procedure sections of Ch. 12 are by incorporation as much part of Ch. 15, as if they were specially set out therein. It is the notification which determines whether the entries shall merely be presumed to be correct until they are proved by evidence to be incorrect or whether the entries made therein shall be conclusive evidence of the rights and obligations of the tenants to which such entries relate and of all the particulars recorded in such entries. In other words, if the notification be under Ch. 12, the entries are merely presumed to be correct until they are proved by evidence to be incorrect, but if the notification be under S. 127, the entries are by virtue of S. 132 conclusive evidence of the rights and obligations as between the tenants and their landlords to which the entries relate and of all the particulars recorded in such entries.

In this case a notification was undoubtedly promulgated under S. 127 of the Act. It follows therefore that the argument advanced by the learned vakil for the appellants on this point must fail.

It was next contended on behalf of the appellants that Ch. 15 is restricted in its operation to disputes between landlords and tenants as such and that it has no application whatever where the tenants claim hostilely to each other inter se. After the most careful consideration that we have been able to give to this case, we are of opinion that the plaintiffs' contention must prevail. It is elementary that a statute which purports to oust the jurisdiction of civil Courts must be very strictly construed; and we must be specially on our guard that we do not by our decision allow the civil Courts' jurisdiction over matters not expressly or by necessary implication taken away to be lightly interfered with. The whole object of Ch. 15 is to protect the tenants against the landlords in localities where they are in need of such protection. Ch. 15 is headed :

"Record of Rights and obligations of raiyats being khunt katti rights, village headmen and other classes of tenants."

Section 127 provides that the Local Government may make an order directing that a record be prepared by a Revenue Officer of the rights and obligations in any specified local area of : (a) raiyats having khunt katti rights, (b) headmen of villages or groups of villages whether known as Mankis or Pradhans or manjhis or otherwise or (c) any other class of tenants. We are of opinion that : "the rights and obligations of tenants" mean rights and obligations of tenants with reference to landlords only, so that once those rights and obligations are ascertained they become final and are not liable to be called in question in any civil Court. In our opinion Ch. 15 gives no power to the Revenue Officers to deal, it may be with complicated questions of title between tenants claiming hostilely to each other.

It was strenuously contended that S. 132 is very wide in its terms and makes the entries conclusive evidence not only of the rights and obligations of the tenants but of all the particulars recorded in such entries. But we must read S. 132 consistently with the whole of Ch. 15 and with the general policy of the

legislature provided therein to protect the tenants against the landlords and when so read, the words "of all the particulars recorded in such entries" must mean the particulars of the rights and obligations of the tenants as against and to the landlord. In our opinion S. 133 supports this interpretation, inasmuch as it provides that though the landlord may have described the tenant as a thicadar or as a temporary leaseholder, the Revenue Officer is yet to enquire into the real status of the tenant and into the origin and nature of each tenancy. Indeed, if all the provisions of Ch. 15 are to be read as consistent with each other and with the declared policy of the legislature, we are bound to come to the conclusion that the operation of Ch. 15 is limited to questions relating to settlements between landlords and tenants and that the Revenue Officer has no power under Ch. 15 to finally decide questions between tenants claiming as against each other. In our opinion the Courts below were wrong in holding that the Record of Rights prepared in the case was in itself conclusive evidence in a title dispute between two sets of tenants. Mr. Mukherji on behalf of the respondents has, in this Court, put forward an additional argument, namely, that the plaintiffs' suit being a suit to set aside either directly or indirectly an order or decree of the Deputy Commissioner or Revenue Officer under Ch. 15, is not entertainable by any Court by virtue of S. 258 of the Act. In our opinion there is no force in this contention. S. 258, is as follows :

"Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under Ch. 15 . . . except on the ground of fraud or want of jurisdiction."

The suit or proceeding under Ch. 15, must mean a suit or proceeding between a landlord and a tenant. The only suit or proceeding contemplated in Ch. 15 is a suit or proceeding under S. 130, and admittedly there has been no suit or proceeding in this case under S. 130. In our opinion S. 258 is not a bar to the present suit by one set of tenants to recover joint possession of the land in dispute from another set of tenants. There is obviously no merit in the other ground on which the plaintiffs' suit has been

dismissed, namely, that they were not competent to ask for joint possession. It was conceded by Mr. Mukherji in the latter part of his argument that when there has been an ouster, the party out of possession is competent to maintain a suit for joint possession.

We allow this appeal and remand the case to the lower appellate Court for decision on the merits, with a direction that if the lower appellate Court finds it impossible to come to a decision on the merits on the materials on the record it should in its turn remand the case to the Court of first instance to record such evidence as has been shut out and to dispose of the case according to law. The respondents must pay the costs of this appeal and of the appeal in the lower appellate Court. The costs of the suit before the Court of first instance are reserved and will follow the event.

Atkinson, J.—I concur.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 74

ROE AND COUTTS, JJ.

Babua Lal Pardhan—Defendant—Appellant.

v.

Badri Lal Pardhan and another—Plaintiffs—Respondents.

First Appeal No. 87 of 1916, Decided on 23rd January 1919, from a decision of Sub.-Judge, Darbhanga.

(a) **Arbitration—Terms of agreement vague and indefinite—Agreement is bad.**

Where the terms of an agreement of reference to arbitration are so vague as to make it impossible to ascertain what the dispute was which the parties referred to arbitration, the agreement of reference is bad for indefiniteness. [P 76 C 1, 2]

(b) **Arbitration—Arbitrators more than one—Presence of all is essential at all meetings.**

The presence of all the arbitrators, where there are more than one, at all meetings and above all at the last meeting when the final act of arbitration is done is essential to the validity of the award. [P 77 C 1]

(c) **Arbitration—Award signed by arbitrator—He can record note of dissent.**

Until an award is communicated, there is nothing to prevent an arbitrator changing his mind. He cannot be said to be functus officio until the pronouncement is actually made, and even if he has signed the award, this does not preclude him from further considering the matter and, if he thinks fit, recording a note of dissent. [P 78 C 1]

(d) **Arbitration—Deed of reference not providing for prevalence of views of majority—Majority award cannot be maintained—award not unanimous on its face—Party in**

favour of validity must establish that it is in fact unanimous.

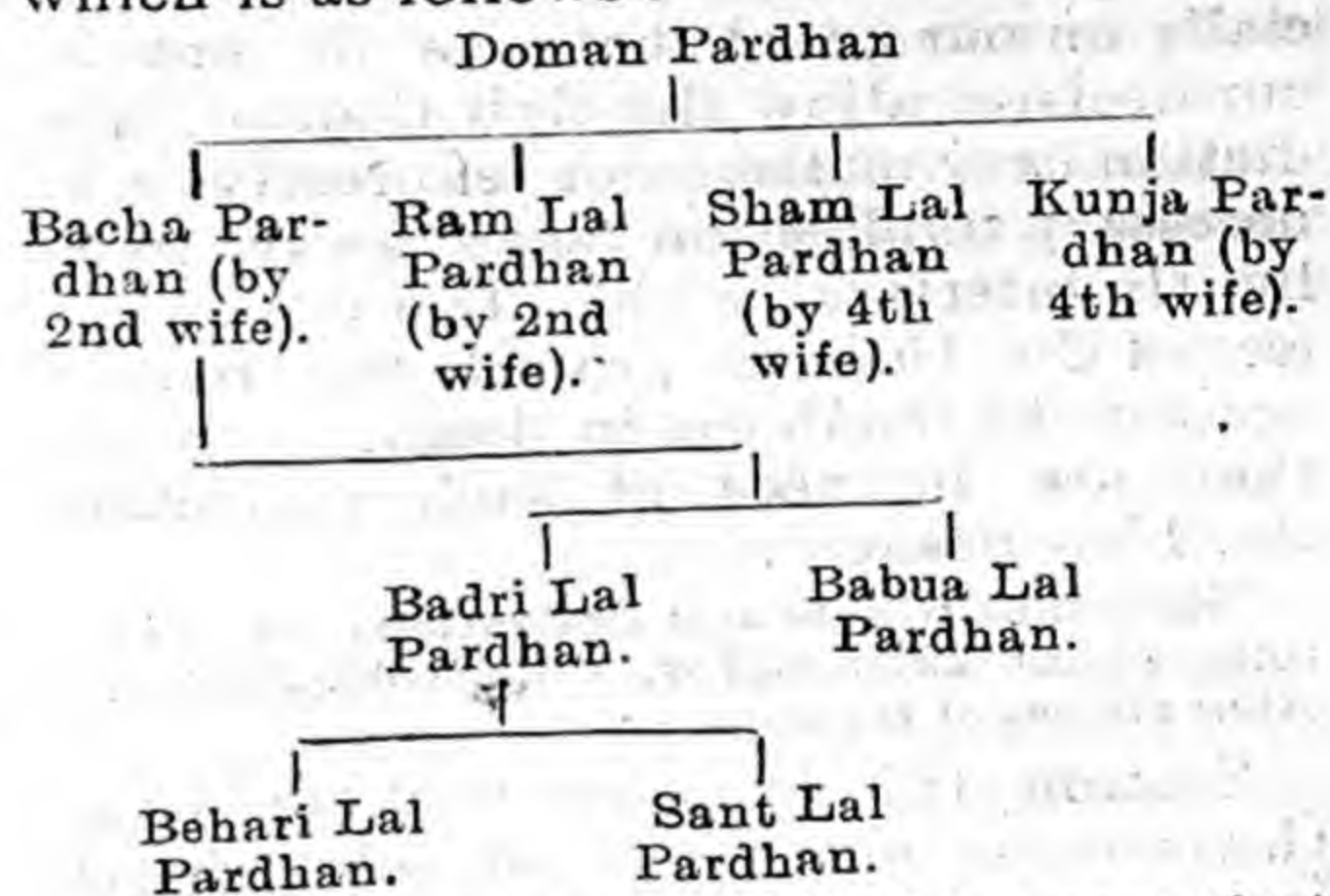
Where a dispute is referred to several arbitrators and the deed of reference makes no provision for the prevalence of the views of the majority in the case of the decision not being unanimous, a majority award cannot be maintained.

It is for the party contending in favour of the validity of an award to establish beyond doubt that an award which is on the face of it not unanimous was in fact unanimous. [P 78 C 1, 2]

Hasan Imam and Murari Prasad—for Appellant.

Lachmi Narain Singh and Rajendra Prasad—for Respondents.

Coutts, J.—This appeal arises out of a suit for partition. In order to understand the case it will be convenient to first state the genealogy of the family, which is as follows:



From this genealogy it will appear that Doman Pardhan had two sons, Bacha Pardhan and Ram Lal Pardhan, by his second wife, and two sons, Sham Lal Pardhan and Kunja Pardhan, by his fourth wife, and the plaintiff's case is that Sham Lal Pardhan and Kunja Pardhan, together with their father, separated from Bacha Pardhan and Ram Lal Pardhan, each branch living as a joint Hindu family. After Bacha Pardhan died his sons, Badri Pardhan and Babua Lal Pardhan, continued to live jointly with Ram Lal Pardhan and on the death of Ram Lal Pardhan, who left no issue, Badri and Babua continued to live in a joint family. Badri died some 14 years ago, leaving a son, Bihari Lal Pardhan, and after his death Babua and Bihari lived jointly, Babua being the karta of the family and managing the whole affairs of the family. The parties continued to live amicably together so long as Babua, defendant 1, had no children. But Babua eventually married and about ten months before the institution of this suit a son was born to him (defendant 2).

After the birth of this son, ill-feeling arose between himself and the plaintiff and there were disputes about shares in the family property. Eventually, to settle these disputes, an ekrarnama was executed by both the parties on 1st June 1913, by which five persons were appointed to arbitrate and settle the differences.

The arbitrators proceeded to take evidence and decide the matter, and on 7th September 1913 they signed an award, by which half of the whole joint property, including the property of Ram Lal, was equally divided between the plaintiff and the defendant. Disputes still went on however and the plaintiff asked for a partition of his half-share. This was refused and a dispute arose, which culminated in a case under S. 144, Criminal P. C., in which the defendants were successful. The plaintiff then instituted this suit asking for the following principal reliefs:

(1) That it may be determined by the Court that the plaintiff and the defendant are members of a joint family and the plaintiff has half-share in the joint family properties and the defendant has share in the remaining half. As regards the joint family properties detailed in the schedules of the plaint, so far as the plaintiff has got information about them and other properties which will be included hereafter as soon as any trace of them will be found, it may be determined that the plaintiffs have half-share, the remaining half belonging to the defendant. (1) (*ka*) It may be determined by the Court that under an award of the arbitrators, dated 7th September 1913, referred to in para. 7 of the plaint, the plaintiff's share in the entire property of the joint family has been decided to be 8-annas and the parties in the suit are bound by the said award. (1) (*kha*) An order may be passed by the Court that defendant 1 should render an account of the receipts and expenses of the joint family to the plaintiff. (2) That it may be determined by the Court that your petitioner is entitled to get the property of the joint family partitioned in respect of his own half-share. (3) That as a result of the determination of the points set forth above, first a preliminary decree may be passed in favour of the plaintiff for partitioning half the share of the joint family properties and sub-

sequently by deputing a Commissioner the entire property may be properly divided into two shares and one of them may be given in possession of the plaintiff. This shortly is the case for the plaintiff.

The defendant on the other hand contends that the plaintiff has no title to the property in suit; that the family did not split up into two as alleged by the plaintiff, but there was a complete disruption of the family. Doman divided his property between his four sons, Ram Lal, Bacha, Kunja and Sham Lal, and they remained separate. He further alleges that Ram Lal, just before his death, adopted him and that at that time he became separate from his brother Badri, the father of the present plaintiff. He consequently contends that the whole of the property in dispute belongs to him. So far as the ekrarnama referring the dispute between himself and his brother to arbitration is concerned, he alleges that he was forced into agreeing to the reference to the arbitrators and he further alleges that for various reasons, to which I shall have occasion to refer later, the award of the arbitrators is illegal and invalid. The case was heard by the Subordinate Judge of Darbhanga who has decreed the suit. Against this decree the defendant has appealed. In appeal only two points have been argued before us. These are issues 7 and 9 which are as follows: Issue 7: "Were defendant 1 and the plaintiff's father, Badri Pardhan, separate from each other at the time of Badri Pardhan's death and did Ram Lal Pardhan die in a state of separation from them? Issue 9: "Are the agreement to submit to arbitration, dated 1st June 1913, and arbitration award, dated 7th September 1913, legally valid and binding documents? Did the plaintiff acquire any valid right or title under them? I shall deal, as the learned Subordinate Judge has done, with the latter issue 1. The first contention of the defendant in regard to this issue is that he was coerced into executing the ekrarnama referring the dispute to arbitration.

His story is that the plaintiff's mother, a pardanashin lady, being annoyed by the birth of his son, went to his shop in the bazar and demanded a partition. A dispute arose and a large crowd of people collected. The defendant felt that his

family was being disgraced by the appearance of a pardanashin lady of his family in public and when she also threatened to inflict a wound on herself and go to the Thana, he was frightened and agreed to the reference of the dispute to arbitration. The learned Subordinate Judge has disbelieved the major portion of this story. On a careful consideration of the evidence, I cannot but agree with his view and in fact the matter is not very material, because the stamp paper, on which the ekrarnama was engrossed, was purchased jointly by the defendant and the plaintiff some months after the date of the alleged coercion. So even assuming that the defendant was frightened by the plaintiff's mother coming to his shop and brawling, he had ample time to reconsider the matter before he executed the ekrarnama. The reference to arbitration was made by the ekrarnama and it cannot be said that at this time there was any coercion.

It has been however strongly urged before us by Mr. Hassan Imam that the ekrarnama is bad on account of vagueness. The ekrarnama, which is a short document after reciting who the parties are runs as follows:

"There is a dispute between Bihari Pardhan, minor son of Badri Pardhan deceased, represented by me the musammam mother and guardian of Bihari Pardhan aforesaid, and Babua Lal Pardhan in respect of shares in and title (to some property). We both parties therefore appoint the Hon'ble Babu Brij Kishore Prasad, Pleader Babu Buddhu Lal, Babu Thanmal, Babu Jokhi Ram and Babu Hardwar Mal as arbitrators and we both parties agree that whatever the arbitrators will decide in respect of the title after taking evidence we will abide by their decision and accept it. None of the parties shall directly or indirectly object to their decision. If any of the parties make any objection as against this deed, then in the face of this deed it will be considered null and void. We therefore execute this ekrarnama appointing the arbitrators so that it may be of use when required."

The ekrarnama then merely recites that there is a dispute between Bihari Pardhan and Babua Pardhan in respect of "shares in and title." After the word "title" something is obviously omitted in the document and it is impossible to say what this is. It is urged by Mr. Lachmi Narain Singh for the plaintiff-respondent that the ekrarnama must refer to the whole property, because the arbitrators have dealt with the whole property. Even if this were so, the

contention merely begs the question and the probability in the absence of any definite evidence is that the ekrarnama was only meant to refer to the shop, because it was in regard to the shop that the proceedings under S. 144, Criminal P. C., were instituted. And that the arbitrators were not sure of the scope of the ekrarnama is clear also from the award itself. In the body of the award they mention definitely certain classes of property and at the end of each class there occurs the word "etc." It is clear from this that the arbitrators did not know what the property in dispute was and the learned Subordinate Judge himself found that the award does not cover the whole of the property but only the properties specifically mentioned in the award and he has accepted the award only to this extent. This is obviously wrong, because the ekrarnama does not mention these properties and it was not not open to the arbitrators to decide for themselves what property they would arbitrate about. It is impossible to say to what property the ekrarnama referred and as I have already said, it would appear from the wording of the ekrarnama itself that the parties were not very sure what in fact they were referring to arbitration. Probability points to its being only the shop, but it is impossible to come to any definite conclusion and, in my opinion, the ekrarnama is bad for indefiniteness.

I next come to the award itself. In regard to this Mr. Hasan Imam's main contentions are that it goes beyond the scope of the ekrarnama, that the proceedings of the arbitrators were not conducted in accordance with the terms of the ekrarnama and finally that the award of the arbitrators is not unanimous and there being no provision in the ekrarnama for a majority award, the award is for this reason also bad. I have already dealt with the first contention and in my view the award is bad because it is not shown to be within the scope of the ekrarnama. I next come to a consideration of the proceedings of the arbitrators. The first point urged is that by the ekrarnama it was provided that witnesses should be examined and their evidence recorded but that this was not done. It is clear from the statement of the principal arbitrator, the Hon'ble Babu Brij Kishore Prasad, Pleader, that

in fact witnesses were examined, and on this point I accept the finding of the learned Subordinate Judge and agree that the award cannot be impeached but in other respects the proceedings of the arbitrators and their final award are unsatisfactory. The principal arbitrators appear to have been the Hon'ble Babu Brij Kishore Prasad and Babu Budhu Lal. Both of these arbitrators have been examined but their evidence is of the vaguest possible character. There is no suggestion nor can there be any suggestion that these arbitrators have deposed falsely, but they kept no notes and they can give no details of the proceedings. They do not even know how often they sat. They do not say that all the arbitrators were present at each of these sittings and it would appear from the evidence of Babu Lakshman Prasad, a Pleader of Darbhanga who represented the defendant, that all the arbitrators were not present at each meeting. This evidence is unrebutted. The witness is a respectable pleader whose evidence there is no reason to disbelieve and on the authority of the case reported as *Nand Ram v. Fakir Chand* (1) Mr. Hasan Imam has asked us to hold that the award is invalid. In the case referred to Mr. Mahmud in a carefully considered judgment has said that the presence of all the arbitrators at all meetings and above all at the last meeting, when the final act of arbitration is done is essential to the validity of the award. With this view of the law I agree. In the present case it is clear from the evidence of Babu Lakshman Prasad that all the arbitrators were not present at all the meetings which were only 3 in number and for this reason also I find that the award is bad.

I now come to the last point urged by Mr. Hasan Imam with regard to the award, namely that it is not unanimous. The argument is based on the fact that on the award above the signature of one of the arbitrators, Hardwar Mal, there appear words "I do not agree in this." On the face of it this is a clear indication that the award is not an unanimous one, but it is contended that these words were interpolated by Hardwar Mal after the award had been signed and communicated to the parties. The learned Subordinate Judge has accepted this conten-

tion but with his conclusion I cannot agree. With the aid of a microscope I have carefully examined the writing of the words "I do not agree in this" and have compared them with Hardwar Mal's signature. I can find absolutely no difference either in the ink or in the writing, and from the appearance of the signature and the words "I do not agree in this" both would appear to have been written with the same pen the same ink and at the same time. Hardwar Mal has not been examined by either party, but in support of the view that he interpolated these words after signing the award the evidence of Brij Kishore and Budhu Lal has been relied on. The gist of the evidence of these witnesses is that the award was unanimous and that after it was signed it was handed over to Buddhu Lal that Hardwar Mal got the award from Buddhu Lal and that when he returned it Buddhu Lal found that these words had been interpolated. Mr. Hasan Imam has said that he does not desire to impugn the veracity of these witnesses, but he urges that their recollection of what actually occurred is so vague and the proceedings were conducted in such a haphazard way that their statements cannot be relied on and that in spite of their evidence it is clear that Hardwar Mal was a dissenting arbitrator.

A careful perusal of the evidence shows beyond doubt that their recollection cannot be relied on. Babu Brij Kishore, without looking at the award, was unable to say who the arbitrators were. He does not know how long after the award was written it was communicated to the parties, nor can he remember whether the award was made over to the parties. He further says that there were 5 or 7 sittings of the arbitrators and that the number of sittings was more than three. This last statement is certainly wrong as appears from the evidence of the plaintiff's own uncle and the whole statement is so vague that it is impossible to rely on it for any details of what occurred. Further he admits that Hardwar Mal might have been wavering, though in regard to this he is also not certain. The evidence of Buddhu Lal is equally vague and the only point about which he appears to be really certain is that Hardwar Mal made a note of dissent after he had signed the award.

(1) [1885] 7 All. 522.

On evidence of this kind I am not prepared to accept the view of the learned Subordinate Judge that this note of dissent was made after the award had been signed. It was for the plaintiff to establish beyond doubt that the award which is on the face of it not unanimous was in fact unanimous but this he has failed to do. Even assuming, however that Hardwar Mal made the endorsement after he signed the award, it would still be for the plaintiff to show that he made the endorsement after the pronouncement of the award. The learned Subordinate Judge has found that the endorsement was made after pronouncement, but this finding is based on absolutely no evidence. Buddhu Lal himself, who is the only witness on the point, says he cannot remember whether the award was pronounced before or after Hardwar Mal made the note of dissent. There is nothing then to show that the note of dissent was made after pronouncement, and in the absence of such evidence it must be held that it was made before pronouncement; and until the award is communicated there is, in my opinion, nothing to prevent an arbitrator changing his mind. He cannot be said to be *functus officio* until the pronouncement is actually made, and even if he has signed the award this would not preclude him from further considering the matter and, if he thinks fit, recording a note of dissent. In my opinion therefore the award is also bad because it is not unanimous. (The remainder of the judgment is not material for the purposes of this report—*Ed.*)

Roe, J.—I entirely concur in the conclusions arrived at by my learned brother upon the two issues argued. Though loath to overrule the opinion of the learned Subordinate Judge upon the question of fact, I feel that the *ekrarnama* executed by Doman Singh is obscure and may best be interpreted in the light of subsequent events. Those subsequent events clearly indicate a separation between the four sons of Doman. I take it therefore that the document executed by Doman should be regarded as indicating such a separation. The learned Subordinate Judge on the other hand, having arrived at the conclusion that Doman's document indicates a separation into two joint families only, seems to have allowed this consideration

to colour his views upon all subsequent events.

I agree also that the *ekrarnama* executed by Babua did not result in a valid award. The summary nature of the proceedings and the casual manner in which both arbitrators and parties attended them indicate that they were not taken seriously and the reason for this lack of seriousness seems to me to lie in the vagueness of the issues submitted to the arbitrators. I agree too that, there being no provision for the prevalence of the views of the majority in the case of a decision not unanimous, in view of the fact that the decision was not unanimous the award cannot be maintained.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 78

JWALA PRASAD, J.

Awadh Behari Lal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 382 of 1917, Decided on 17th December 1917, from decision of Munsif, Sitamarhi.

(a) Criminal P. C. (1898), S. 476—Execution proceedings—Judgment-debtor filing petition of satisfaction—Court finding it to be forgery—Finding upheld by appellate Court—Appellate Court directing judgment-debtor's prosecution under S. 476—Trial Court held had jurisdiction to institute proceedings under S. 476 though directed by appellate Court to do so.

During the course of an execution proceeding pending before a Munsif the judgment-debtor filed a petition of satisfaction, which was held by the Munsif to be a forgery. The finding of the Munsif was upheld in appeal and the District Judge sent the record back to the Munsif, with the direction that he should take proceedings against the judgment-debtor under S. 476, Criminal P. C. The Munsif called upon the judgment-debtor to show cause why he should not be prosecuted for forgery and eventually directed his prosecution :

Held : that the Munsif was competent to institute proceedings against the accused under S. 476 and that the proceeding was not vitiated by the mere fact that the District Judge had directed the Munsif to institute the proceedings.

[P 79 C 2]

(b) Criminal P. C. (1898), S. 476—Mere delay in instituting proceedings does not vitiate them.

Mere delay in instituting proceedings under S. 476 does not vitiate the proceedings. The guiding principle is whether the presiding Judge at the time of hearing the case had come to any conclusion as to whether the offence was committed or not.

[P 80 C 2]

G. C. Pal—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is an application for revision of an order of the Munsif of Sitamarhi under S. 476, Criminal P. C., directing the prosecution of the applicant for offences under Ss. 193 and 465, I. P. C., said to have been committed in connexion with a petition of satisfaction, dated 7th December 1910, filed by the applicant in the Court of the Munsif. The applicant was a judgment-debtor in an execution case, No. 971 of 1910, *Baij Nath Raot v. Oudh Bihari Lal*, applicant, pending in the Court of the Munsif. The decree-holder filed an application for execution of the decree on 15th August 1910 and in due course 7th December 1910 was fixed for sale of the applicant's property. On that day a petition of entire satisfaction was filed in Court purporting to be on behalf of the decree-holder. Later on on the same day the decree-holder filed a petition repudiating the aforesaid petition and alleging that the said petition was forged and fraudulent. The decree-holder denied receipt of any money under the decree. Both parties, namely the decree-holder and the judgment-debtor-applicant went into evidence before the Munsif. The petition, after a detailed enquiry by the Munsif, was disposed of on 20th May 1911. The Munsif wrote a long and full judgment and came to the conclusion that the petition of satisfaction filed by the applicant was a forged one. The Munsif concluded his judgment in the following words :

"I find that the judgment-debtor did not pay any money to the decree-holder and that the petition, Ex. 1, is a forgery."

The plea of payment was thereupon disallowed. The applicant then appealed to the District Judge. The District Judge, by his judgment of 11th August 1911, dismissed the appeal and agreed with the finding of the Munsif in all respects. He further ordered :

"The record to be returned to the lower Court with the direction to draw up proceedings against Awadh Bihari Lal, applicant and to take such further action against him as may be necessary."

The reason why the District Judge himself did not direct the prosecution but sent the record back to the Munsif to take action under S. 476, is given by the District Judge to be that

"all the witnesses in the case were residents of Sitamarhi and the offence was committed there. It would be convenient to all that the matter should be taken up in the lower Court."

The Munsif on 21st August 1911 drew up proceedings under S. 476 in the following terms :

"Whereas it appears that Awadh Behari Lal, the judgment-debtor, in Execution Case No. 971 of 1910, fabricated a false petition purporting to be one certifying full satisfaction of the decretal money, forged the signature of the decree-holder Baijnath Raut on that petition, and gave false evidence in support of that petition. It is hereby ordered that the said Awadh Behari Lal do show cause why he should not be criminally prosecuted for fabricating false evidence, forgery and perjury within a week of the service of notice on him."

The applicant showed cause by a written petition on 21st September 1911. In this petition he asserted that the petition of satisfaction of 7th December 1910 was not forged or fabricated and that the decretal amount was paid and satisfied as mentioned in the said petition. On that very day the Munsif considered the cause shown and held that it was not sufficient and thereupon directed the prosecution of the applicant for the charges referred to above. Aggrieved by this order of the Munsif the applicant has moved this Court. The first ground urged by the learned vakil for the applicant is that the Munsif was not competent to direct the prosecution under S. 476, Criminal P. C., inasmuch as the Munsif did not do it of his own accord but upon the direction of the District Judge in his decision of 11th August 1911 dismissing the appeal of the judgment-debtor in Miscellaneous Case No. 971. It is clear from the judgment of the Munsif of 20th May 1911 that the learned Munsif was of opinion himself that the petition was a forged one. He expressly declared it to be so, as would appear from the concluding words quoted above. The matter went up in appeal. The District Judge agreed with the Munsif in the finding that the petition was a forged one, but for the reasons given by him he himself did not initiate proceedings under S. 476.

As contended by the learned vakil, no doubt the District Judge himself was competent to direct prosecution under S. 476 as the offence came to his knowledge in the course of judicial proceedings, namely, during the hearing of the appeal, and should have done so. This does not however vitiate the proceedings taken by the Munsif. The cardinal principle in such cases is to see what was in the mind of the Munsif at the time when he

heard the original miscellaneous case. It is apparent from his judgment and the concluding passage quoted by me that it was clearly in his mind, while disposing of the contention of the parties regarding the petition of satisfaction in question, that a clear forgery was committed and that no money was at all paid by the judgment-debtor and that the petition was a fabricated one. It is possible that the Munsif did not take action as the matter was appealable. If that was so, the Munsif exercised a wise discretion in abstaining from taking action until the period had expired, in terms of the ruling in *Tilak Pandey v. Emperor* (1).

No doubt if the Munsif had acted barely upon the direction of the District Judge and had not exercised his own discretion in the matter, his order under S. 476 would have been bad. Reliance is placed upon the decision of the case of *Lakshmidas Lalji, In re* (2) by the learned vakil for the applicant. The learned Assistant Government Advocate has also drawn my attention to the case of *Riazul Hasan v. Emperor* (3), but in this case the District Judge, who directed the Munsif to direct prosecution under S. 476, did not do so in the course of the judicial proceeding and further the Munsif distinctly said in his order that the reason for his sanctioning the prosecution was the suggestion of the District Judge and the order was passed not upon the knowledge or information of the Munsif himself, but upon those of the District Judge. The case is quite distinct from the present one, where the Munsif from the very beginning was of opinion that forgery was committed in respect of the petition filed before him. The proceeding of 21st August and the Munsif's order of 21st September 1911 under S. 476, Criminal P. C., clearly show that he did not at all do so upon the direction of the District Judge.

The case of *Lakshmidas Lalji, In re* (2) does not at all support the view of the learned vakil for the appellant. All that was held in that case is that the Judge had jurisdiction to pass order under S. 476 but the form of the order which he actually passed was not, strictly speak-

ing, in conformity with S. 476 read with S. 195, Cls. (a) and (b). In that case the Subordinate Judge had refused to grant sanction under S. 195. The District Judge in appeal under S. 195 disagreed with the Subordinate Judge and directed him to direct prosecution under S. 476. This is quite different from what we have in the present case. I therefore overrule this contention. I am of opinion that the order under S. 476 was passed by the Munsif upon his own notion of the offence having been committed before him, and not upon the suggestion of the District Judge.

The next contention of the learned vakil was that there has been delay in drawing up proceedings under S. 476. There is no substance in this contention. The delay if any was caused by the applicant himself. The petition for satisfaction was filed on 7th December 1910 and after certain adjournments taken up by the judgment-debtor himself, as will appear from the order sheet of the Munsif, the matter was disposed of on 20th May. The judgment-debtor appealed to the District Judge and the appeal was disposed of on 11th August. The present proceedings were instituted against the petitioner on 12th August after the receipt of the judgment of the District Judge by the Munsif. There does not appear to have been any delay, therefore in the proceedings that were drawn up, as pointed out in the ruling quoted above [*Tilak Pandey v. Emperor* (1)], delay in itself is not sufficient to vitiate proceedings under S. 476, and, as observed by me, the guiding principle is whether the presiding Judge at the time of hearing the case has come to any conclusion as to whether the offence was committed or not. In this case we find that in the order of the Munsif of 20th May he was clear in his mind of the offence having been committed. I therefore overrule this contention also.

The last contention has been that there is no reasonable chance of the prosecution being successful. I have not been able to appreciate this argument of the learned counsel. It is needless to go into the merits of the case at this stage, nor is it desirable to give any expression of opinion as to the chance of success of the prosecution. It is sufficient for direction under S. 476 that two Courts have come concurrently to the conclusion that

(1) A. I. R. 1915 All. 135=37 All. 344=29 I. C. 97.

(2) [1908] 32 Bom. 184.

(3) [1910] 4 I. C. 260.

the petition was a forged one. It has not at all been suggested that there was absolutely no evidence to support the view taken by the Courts below. The contention must therefore fail. The result is that the application is rejected.

V.S./R.K.

Application rejected.

*** A. I. R. 1919 Patna 81**

JWALA PRASAD, J.

Lalji Hari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 235 of 1917, Decided on 25th July 1917, from an order of Deputy Magistrate, Purnea, D/- 22nd January 1917.

*** Criminal P. C. (1898), ss. 250 and 476—Complainant ordered to pay compensation under S. 250—Prosecution under S. 211, I. P. C., held incompetent and unjustified.**

A Magistrate, while disposing of a criminal case before him, ordered the complainant to pay Rs. 100 as compensation to the accused under S. 250, Criminal P. C. Three weeks after the disposal of the case the Magistrate passed an order directing the issue of notice upon the complainant to show cause why he should not be prosecuted for an offence under S. 211, I. P. C.

Held: that in the circumstances of the case the order calling upon the complainant to show cause why he should not be prosecuted was not proper and would not be justified in the exercise of a sound judicial discretion. [P 83 C 1]

Hasan Jan—for Petitioner.

Govt. Pleader—for the Crown.

Judgment.—This is an application for setting aside an order of the Deputy Magistrate of Purnea, dated 22nd January 1917, directing the prosecution of the petitioner under S. 211, I. P. C. On 16th October 1916, at 7 a. m. the petitioner lodged an information before the Sub-Inspector of Kadawa charging one Dhanaullah and his nephew Surajuddin of having entered his house and having forcibly removed the evening before a thali and lota worth Rs. 5 in lieu of a debt of the same amount, which the petitioner had borrowed from Dhanaullah and had failed to pay on previous demands and was not able to pay on demand at the time of the occurrence.

The Sub-Inspector investigated the case and sent up the accused for trial on 25th November 1916. The accused named by the petitioner, namely, Dhanaullah and Surajuddin, were tried by the Deputy Magistrate of Purnea and were acquitted by him by his judgment dated 14th December 1916. The Magistrate held that the case was maliciously false

and had been got up by one Khwaja Asgar and the Sub-Inspector of Kadawa and that the complainant was a mere tool in their hands. The Magistrate called upon the petitioner to show cause against payment of compensation to the accused under S. 250, Criminal P. C. The petitioner applied for time to take copies of papers and to instruct a pleader to show cause on his behalf, on the ground that the case was in the hands of the prosecuting Inspector and that he had no papers with him. The petition was rejected and the complainant Lalji was directed to pay to each of the accused Rs. 50, i. e., a total sum of Rs. 100 as compensation. On 4th January 1917, i. e. three weeks after the disposal of the case, the Magistrate passed orders directing the issue of notice upon the petitioner to show cause why he should not be prosecuted under S. 211 for bringing a false case, and upon Khwaja Asgar and the Sub-Inspector of Kadawa for abetting that offence.

On 22nd February 1917, the Magistrate made the order absolute and directed the prosecution of the petitioner under S. 211 and of Khwaja Asgar and the Sub-Inspector of Kadawa under S. 211 read with S. 109, I. P. C. The Sub-Inspector Khair-ud-din Ahmed moved this Court against the aforesaid order of the Magistrate. The application was heard by the learned Chief Justice and Roe, J., and the proceedings against the Sub-Inspector were quashed on 20th April 1917. Khwaja Asgar also made similar application to this Court, which was heard by Mullick, J., and the proceedings against him also were quashed on 21st May 1917. The petitioner has now come up to this Court for setting aside the proceedings against him. I have carefully been through the record and am of opinion that the proceedings against the petitioner also should be quashed. So far as the petitioner was concerned, the Magistrate on 14th December 1916 directed him to pay Rs. 100 as compensation to the original accused. This he thought was enough to meet the ends of justice, as he did not at that time take action under S. 476, Criminal P. C., to direct the prosecution of the petitioner under S. 211, I. P. C. It does not appear how the Magistrate suo motu long after the disposal of the trial thought it desirable that the peti-

tioner should be prosecuted under S. 211. It appears however that the Magistrate had in his judgment come to the conclusion that the petitioner was a tool in the hands of Khwaja Asgar and the Sub-Inspector of Kadawa and that the case was instituted at their instigation against the original accused. The Magistrate obviously on 4th January thought that action should be taken in order to punish these two persons for having instigated the false charge. They could not be dealt with under S. 250, Criminal P. C., as they were not complainants.

The proceeding under S. 476, Criminal P. C., against them as abettors and instigators obviously necessitated the proceedings against the petitioner also, he being the principal. There is no other reason why the Magistrate preferred to direct the petitioner to pay compensation under S. 250 instead of prosecuting him under S. 211, if in fact he intended that the ends of justice required that the petitioner should have been dealt with under S. 211. The Magistrate therefore does not appear to have intended originally to prosecute the petitioner under S. 211, when the trial of the original case concluded before him and ended in their acquittal. In view of the Full Bench authority in *Begu Singh v. Emperor* (1), the present proceedings against the petitioner would not be justified. Similar was the view taken by a Division Bench of the Calcutta High Court in *Bhim Lal Shah v. Bisa Singh* (2), where it was pointed out that if the Magistrate

"had thought that action ought to be taken under that section (S. 211) he ought to have passed that order one-and-a-half months before" when the case terminated :

"The fact that he did not do so at that time indicates very strongly that he did not at that time think it necessary that the belated order of the Magistrate (passed a month and a half afterwards) does not represent his independent judicial opinion."

Stronger is the view taken by a majority of five Judges to one in the Full Bench case of *Aiyakannu Pillai v. Emperor* (3), where the District Magistrate suo motu issued notice on 29th October for false evidence given in a case the judgment of which was delivered on 8th October 1907 : vide also *Rahimad-*

ulla Sahib v. Emperor (4). The view of the Bombay High Court in *Lakshmidas Lalji, In re* (5) that there is nothing in the language of S. 476 which makes it incumbent upon a Court to act under it and take action within any particular period or at any particular time, was not followed by the Madras High Court. The Allahabad High Court on the other hand in *Tilak Pandey v. Emperor* (6) and *Nawal Singh v. Emperor* (7) adopted the view of the Bombay High Court where the Subordinate Judges waited for the result of the appeal from their judgments in the civil cases concerned out of which the criminal proceedings arose. There was an original intention in the Court to prosecute the offenders and the delay to wait for the appeal was held justifiable. This is not the case here. No doubt no hard and fast rule can be deduced from the sections in the Code of Criminal Procedure as to whether the Court would or would not be justified in the exercise of a sound judicial discretion to direct the prosecution under S. 211 long after the conclusion of the trial before it. It depends, in my opinion, upon the circumstances of each case whether the Magistrate's order is a proper one or not.

In the present case there is a strong indication of the intention of the Magistrate not to proceed against the petitioner from the fact that he thought that the ends of justice would be met by directing the petitioner to pay compensation of Rs. 100. There is again a conflict of decisions as to whether the order to prosecute under S. 211 should be made when the complainant has been directed to pay compensation. In *Adikkan v. Alagan* (8) it was held that there is nothing illegal in awarding compensation as well as directing the prosecution under Ss. 211 and 193, I. P. C., at one and the same time, but unlike the present case the orders for prosecution and compensation were passed simultaneously, showing that the Magistrate intended to take both the actions at the time when the trial finished. The Calcutta High Court, on the other hand, has taken a contrary view in a series of cases. In *Shib Nath Chong v. Sarat Chunder Sarkar* (9) Sir

(1) [1907] 34 Cal. 551.

(2) [1913] 40 Cal. 444=18 I. C. 345.

(3) [1909] 32 Mad. 49=1 I. C. 597 (F.B.).

(4) [1908] 31 Mad. 140 (F.B.).

(5) [1909] 32 Bom. 184.

(6) [1915] 37 All. 344=29 I. C. 97.

(7) [1912] 34 All. 393=14 I. C. 766.

(8) [1898] 21 Mad. 237.

(9) [1895] 22 Cal. 586.

Comer Petheram, C. J., and Beverley, J., held that the Magistrate acted improperly in directing the prosecution as well as awarding compensation under S. 560 (now 250), Criminal P. C. In *Bachu Lal v. Jagdam Sahai* (10) it was pointed out that although it is not illegal to award compensation as well as to direct the prosecution for bringing a false charge, yet the Magistrate who adopts the two courses simultaneously exercises his discretion improperly.

I think that in the circumstances of the present case it would not be a sound discretion to direct the prosecution of the petitioner when he has already been punished with a fine of Rs. 100 in the shape of compensation. The petitioner, whose entire belongings in the world consist of only pots and pans worth, according to the Magistrate, about Rs. 2, was, as held by the Magistrate a mere tool in the hands of Asgar and the Sub-Inspector. The object of the present proceedings against the petitioner was on account of the action that the Magistrate thought was necessary to take against the wirepullers. It has been held by this Court that there was no evidence against the Sub-Inspector or Khawaja Asgar as to their having instigated Lalji in the first instance to lay a false case. The proceedings against these persons have been quashed by this Court. The object therefore of the proceedings against the petitioner fails. There was, as already said, no intention on the part of the Magistrate, at the time when the proceedings terminated, to prosecute the petitioner for bringing a false charge. Taking the law at the best it cannot in the circumstances of this case be at all held that there was a sound discretion used by the Magistrate in taking action under S. 476 against the petitioner and the Sub-Inspector and Khawaja Asgar who have been discharged. Against the petitioner there is a stronger reason for holding that the discretion was improper against him, for he was already punished and was never intended to be dealt with under S. 211 by the Magistrate. There is absolutely no reason now, after the proceedings against the aforesaid persons have been quashed, to continue the proceedings against the petitioner. On these grounds alone I would upset the order of the Magistrate.

(10) [1899] 26 Cal. 181.

On the merits also I consider that it is impossible or at least highly improbable that the prosecution of the petitioner would be successful. The case was sent up by the Sub-Inspector as having been proved and till the case of the prosecution was over the defence of the accused was never suggested in the cross-examination of the prosecution witnesses, and there is no indication that the case appeared to be false till the accused entered into their defence and examined their witnesses. The accused examined their witnesses on 28th and on 29th November, on which dates the Magistrate passed the following order:

"The case which, from the defence appears to be false, calls for local inquiry and I will fix a date later."

It was principally upon the defence witnesses and upon the local inspection that the Magistrate held the case to be false. We have no note of the local inspection and it is needless to surmise as to the bearing of that inspection upon the merits of the case, except what has been said of it in the judgment regarding the difference in the statement of the complainant as to the distance of the houses of P. Ws. 2 and 3 from the house of the complainant (the Magistrate found it to be 900 cubits as against the complainant's statement of 100 cubits) and from the impression that the Magistrate had of the neighbourhood of the houses of the defence witnesses, as stated by him in his order directing the prosecution dated 22nd February 1917. The Magistrate has clearly gone upon the direct evidence of the defence in order to hold that the case was a concocted one and he expressly states in the order of 22nd February that he did not consider that the non-examination of the interested witnesses in any way led the Court to an incorrect finding, because "the finding was arrived at for the most part on the direct evidence of witnesses who proved that the prosecution had been concocted."

The original accused Dhanaullah is a muharrir of a practising pleader in the subdivision. He had been held by the Magistrate to be a substantial man and to have influence in the locality. D. W. 2 is a muharrir of another practising pleader and does not prove anything beyond that Dhanaullah is a substantial man. D. Ws. 1 and 3 are mukhtears in the subdivision. These three witnesses do not prove that

the case was a false one. D. Ws. 4, 9 and 10 tell, what the Magistrate himself has stigmatised as a startling story, that D. W. 4 was asked by the Sub-Inspector to stand as purchaser of the stolen property promising to reward him for doing so; the Magistrate himself does not appear to have believed this story. D. Ws. 6 and 7 are called to prove an alibi which on the face of it is absurd. They are ordinary village men of no substance under the influence of the petitioner. D. W. 8 is also unworthy of any credence. The whole case will depend therefore upon two or three worthless defence witnesses who are said to be neighbours and who say that no occurrence did take place. The fact that Dhanaullah, the original accused, is an influential man rather indicates why the neighbours of the complainant are going to give evidence on his behalf and also accounts for the nonproduction of more neighbours by the prosecution. It may also be remarked that some of the neighbouring witnesses named in the charge-sheet were not examined for the prosecution and the Magistrate says that these witnesses were the relations of the complainant or dependants of Asgar and would not have been believed if examined.

Thus there is no chance of any conviction of the petitioner upon the evidence that would be available for his prosecution under S. 211, when the onus would be upon the prosecution to establish affirmatively that the case was a false one and that there was no just and lawful ground for bringing the charge by the petitioner against Dhanaullah. I am not concerned with the probability of the story of the petitioner, for the case has been held to be false by the Magistrate and the original accused acquitted. But there is inherent improbability in the case of the petitioner that his pots and pans were removed by such an influential man as Dhanaulla for the petitioner not paying up the money that he had borrowed from him and for putting him off. For the above reasons I set aside the order of the Magistrate of 22nd February 1917 and quash the proceedings against the petitioner.

V.S./R.K.

Proceedings quashed.

****A. I. R. 1919 Patna 84 Special Bench**

DAWSON-MILLER, C. J., COUTTS
AND MANUK, JJ.

Purusottam Narayan Nande—Petitioner.

v.

Chief Secy. to Government—Opposite Party.

Misc. Appln. No. 135 of 1918, Decided on 27th January 1919, to revise order of forfeiture of security, D/- 18th October 1918.

**** (a) Press Act (1910), Ss. 4, 17, 19 and 22—Forfeiture of security—High Court can interfere only if writing is not of nature described in S. 4 (1)—S. 4 is very comprehensive.**

Section 22 read with Ss. 17 and 19 debar the High Court from interfering with an order of forfeiture under S. 4 of the Act except on one ground, namely, that the writing in question is not of the nature described in sub-S. (1), S. 4. [P 85 C 2]

The language used in S. 4 is very comprehensive. It is not necessary that the words complained of should be in themselves seditious in order to bring them within the purview of this section; it is not necessary that they should bring into hatred or contempt His Majesty or the Government established by law in British India. It is quite sufficient if they have this effect with regard to any class or section of His Majesty's subjects in British India. It is not even necessary that they should directly bring about this result. If they are likely or may have a tendency either directly or indirectly and whether by inference, suggestion, allusion, metaphor, implication or otherwise to do so, then they are included within the mischief aimed at by this section. [P 86 C 2]

It is quite legitimate to advocate in writing a change in the system of Government or in the existing social conditions and to urge the community or any section thereof to combine for this purpose. It is also legitimate to compare unfavourably existing conditions with those of a by-gone age, but this can only be done provided the method employed does not infringe S. 4. [P 87 C 1]

(b) Interpretation of Statutes—Particular enactment prevails when general enactment would over-rule former.

Per *Manuk, J.*—Wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative. [P 90 C 1]

Gour Chandra Pal—for Petitioner.

Govt. Advocata—for the Crown.

Dawson-Miller, C. J.—This is an application under S. 17, Press Act, 1910, on behalf of Purusottam Narayan Nande, proprietor of the Ratnakar Press at Muzaffarpur, praying the Court to set aside an order of the Local Government declaring the deposit of Rs. 500 made by the petitioner under S. 3 of the Act to be forfeited to His Majesty. The facts of the case lie

within a very small compass. Towards the end of the last year the petitioner's premises in which he carries on business were searched and a leaflet known as "Ma ki pukar" (Call of the Mother) was found amongst the files kept at the said Press. It is not disputed that the leaflet in question was printed at the Ratnakar Press about a year previously. In the opinion of the Local Government this pamphlet was one the contents of which complied with the description contained in S. 4, Press Act, and they accordingly served a notice in writing upon the petitioner declaring the security deposited by him in respect of the Ratnakar Press and all copies of the leaflet to be forfeited to His Majesty. The petitioner thereupon presented the present petition under S. 17, Press Act, applying to the Court to set aside the order of forfeiture. Two points were argued before us on behalf of the petitioner: (1) that the order forfeiting the security was bad in law and ought to be set aside, inasmuch as the provisions of S. 4 of the Act relating to the form which the notice should take had not been complied with; and (2) that the leaflet in question did not contain any words, signs or visible representations of the nature described in S. 4, sub-S. (1), of the Act. The notice served by the Local Government was in these words:

"Whereas it appears to the Lieutenant-Governor in Council that the printing press known as the Ratnakar Press, Muzaffarpur, in respect of which security to the amount of Rs. 500 has been deposited in accordance with the provisions of S. 3 (1), Press Act, 1910, has been used for printing a leaflet in Hindi entitled "Ma ki pukar" (Call of the Mother) containing words which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise, to bring into hatred and contempt the Government established by law in British India or excite disaffection towards the said Government. Now therefore take notice that the Lieutenant-Governor in Council, in pursuance of S. 4 (1), Press Act, 1910, declares the security of Rs. 500 deposited in respect of the Ratnakar Press, Muzaffarpur, and all copies of the leaflet called "Ma ki pukar" (Call of the Mother) wherever found to be forfeited to His Majesty."

Section 4 of the Act provides that "whenever it appears to the Local Government that any printing press in respect of which any security has been deposited as required by S. 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise . . . to bring into hatred or contempt His

Majesty or the Government established by law in British India or the administration of justice in British India or any Native Prince or Chief under the suzerainty of his Majesty, or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government or any such Prince or Chief . . . the Local Government may, by notice in writing to the keeper of such printing press, stating or describing the words, signs or visible representations which in its opinion are of the nature described above, declare the security deposited in respect of such press and all copies of such newspaper, book or other document wherever found to be forfeited to His Majesty."

It will be observed on referring to the notice served on the petitioner that it does not set out in detail the words complained of in the leaflet in question and the petitioner contends that by reason of this omission the notice itself is defective and not in accordance with the requirements prescribed by the section. Assuming however that the petitioner's contention in this respect should succeed, he is met by the further difficulty that his only ground of redress is that referred to in Ss. 17 and 19, Press Act. These sections provide that any person having an interest in the property forfeited may apply to the High Court to set aside the order of forfeiture on the ground that the document complained of did not contain any words, signs or visible representations of the nature described in S. 4, sub-S. (1), and if it shall appear to the Court that the document was not of the nature there described it shall set aside the order of forfeiture. There is no other provision in the Act giving the Court power to set aside the order on any other ground and by S. 22 it is enacted that:

"Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court, on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

It has already been held in *Mahomed Ali v. Emperor* (1) by a Full Bench of the Calcutta High Court that where the Local Government has by notification declared documents of the nature in question to be forfeited to His Majesty under the powers granted by S. 12 of the Act, the High Court is debarred by S. 22 from questioning the legality of the forfeiture

(1) A. I. R. 1914 Cal. 242=41 Cal. 466.

on the ground that the notification does not comply with the requirements prescribed by S. 12. The ratio decidendi of that case applies with equal force to, and cannot be distinguished from, the case of a forfeiture by notice in writing under S. 4, but we have been asked by the learned vakil for the petitioner to dissent from that decision and come to a different conclusion upon the interpretation of S. 22. I can see no reason to dissent from the judgment in that case. The section expressly provides that no proceeding purporting to be taken under the Act, which the present proceeding undoubtedly was, shall be called in question by any Court except the High Court "on such application as aforesaid." The application there referred to is an application of the nature mentioned in S. 17. S. 17 refers to an application to the High Court by the person aggrieved to set aside the order on one ground and one ground only, namely, that the document is not of the nature described in S. 4 and the powers of the Court set out in S. 19 are confined to setting aside the order upon that ground and no other, and the result is as Sir Lawrence Jenkins C. J., decided in *Mahomed Ali's* case (1) that although the notification does not comply with the provisions of the Act, the Court is barred from questioning the legality of the forfeiture it purports to declare. In the present case, however, the notice served upon the petitioner by the Local Government did in fact, in my opinion, comply with the requirements of S. 4. The section does not require that the words complained of shall be stated verbatim in the notice, but only that they shall be stated or described. In the present case I have no hesitation in holding that there was a sufficient description within the terms of the section by referring to the words as those contained in the leaflet "Ma ki pukar." Nobody could possibly take the description of the words complained of in the notice as applying to anything else than the leaflet in which they appear and least of all, the proprietor of the press by which the leaflet was printed, and if a sufficient description is given to identify the words considered objectionable by the Local Government, in my opinion this would be a compliance with the terms of the statute. The petitioner has therefore failed to substantiate his first point.

He next contended that the subject-matter of the pamphlet did not fall within the description contained in S. 4 of the Act. It is difficult to read this section without remarking the very comprehensive nature of the language used. It is not necessary that the words complained of should be in themselves seditious in order to bring them within the purview of the section; it is not necessary that they should bring into hatred or contempt His Majesty or the Government established by law in British India. It is quite sufficient if they have this effect with regard to any class or section of His Majesty's subjects in British India. It is not even necessary that they should directly bring about this result. If they are likely or may have a tendency either directly or indirectly, and whether by inference, suggestion, allusion, metaphor, implication or otherwise, to do so then they are included within the mischief aimed at by this section. In the case now under consideration I have no doubt whatever that the leaflet was within the description mentioned in S. 4, Press Act. It is written in Hindi and consists of 19 verses. It represents the mother (India) calling to her children. The first five verses are devoted to a description of India as she was in the opinion of the writer in times gone by. He describes her as a paradise on earth where no harsh words or angry faces were to be seen; where money, food and clothing were plentiful, where everybody could get what he wished for to his heart's content and slept without fear. He then contrasts the lot of India at the present day beginning: "Alas, Alas, it is the very same Hindustan now that is reckoned a hell on earth."

Then follows a lament that she has fallen into the hands of foreigners and knows no rest even for a moment, that she has to put up with the words of foreigners and bear their kicks having become as a puppet at a show and a laughing stock to other countries and that while she produces all things dogs eat them, while she yearns for them, and even the meanest laugh at her and she is dried up like a milkman's pail. She then exhorts her 31 crores of children who have been nourished by her from infancy to unite and be resolute and relieve her distress and holds up her "son Gandhi" as an example to be followed.

It is contended that the statements as to the condition of India at the present day are no more than a legitimate reference to the evils which have fallen upon the country in recent times, such as plague, disease and the high prices of food and material which prevail, and that the suggestion is merely that foreign goods and foreign habits and customs are accountable for present conditions. It is argued that the metaphor employed of dogs eating her produce while India yearns for it only refers to foreign competition destroying the home markets and that there is nothing in the leaflet which can be calculated to bring the Government or any section of the community into hatred or contempt. If this indeed was the intention of the writer, he has, to say the least, been most unfortunate in his choice of language. It is undoubtedly quite legitimate to advocate in writing a change in the system of Government or in the existing social conditions and to urge the community or any section thereof to combine for this purpose. It is also legitimate to compare unfavourably existing conditions with those of a bygone age, but under the law as it stands at present this can only be done provided the method employed does not infringe S. 4, Press Act; and whatever the intention of the writer may be, he must take care so to guard his language that it should avoid a tendency to bring into hatred or contempt the Government or any class of His Majesty's subjects in British India. Having read and considered the document complained of I feel bound to come to the conclusion that it comes directly within the description contained in S. 4 of the Act.

The picture conveyed is that of a prosperous, happy and contented people having fallen into the hands of foreigners who abuse and beat them allowing them no rest, who consume their substance and let them go hungry and who convert an earthly paradise into a hell on earth. In my opinion this leaflet, representing as it does an absolutely untrue picture, although it might not impose upon the educated portion of the population, cannot help but bring into hatred and contempt not only the Government of India but the whole of the British community in the minds of an emotional and ill-educated people, a description which

applies to the majority of the peasants of this country who are always apt to give undue weight to matters put before them in print. Moreover, I feel quite unable to accept the suggestion of the petitioner that the intention of the writer of this leaflet was a legitimate and innocuous one. In my opinion the whole thing teems with hatred and contempt against the system of Government and the British community in India and does not hesitate to put forward an entirely distorted view of the existing conditions with the object of fostering sentiments of hatred against those who are alleged to be the authors of the evil conditions depicted, and I think that the petitioner in this case has reason to congratulate himself that he has suffered no worse a penalty than that of the forfeiture of his deposit. I would dismiss this application with costs. Hearing fee three gold mohurs.

Coutts, J.—The petitioner in this case is the keeper of the Ratnakar Press at Muzaffarpur, whose security amounting to Rs. 500 has been forfeited to His Majesty by a Notification of Government No. 1815-C, dated 8th October 1918, which is as follows :

"Whereas it appears to the Lieutenant-Governor in Council that the printing press known as the Ratnakar Press, Muzaffarpur, in respect of which security to the amount of Rs. 500 has been deposited in accordance with the provisions of S. 3 (1), Press Act, 1910, has been used for printing a leaflet in Hindi entitled "Ma ki pukar" (Call of the Mother) containing words which are likely or may have a tendency, directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise, to bring into hatred and contempt the Government established by law in British India or to excite disaffection towards the said Government. Now therefore take notice that the Lieutenant-Governor in Council in pursuance of S. 4 (1), Press Act, 1910, declares the security of Rs. 500 deposited in respect of the Ratnakar Press, Muzaffarpur and all copies of the leaflet called "Ma ki pukar" (Call of the Mother), wherever found, to be forfeited to His Majesty."

Two points have been urged before us on behalf of the petitioner. The first is that the notification is not in accordance with law inasmuch as the words in the leaflet "Ma ki pukar," which would bring the case within the scope of S. 4, Press Act, have not been sufficiently stated and described as required by that section. It is however clear from the notification that it refers to the leaflet as a whole and not to any particular words in it. This being so, it was unnecessary in the notifi-

cation to set out the whole leaflet which has I consider been sufficiently described. Even if this were not so however we would not, in my opinion, be entitled to consider the sufficiency or otherwise of the notification. S. 22 of the Act is as follows :

"Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court, on such application as aforesaid, and no civil or criminal proceedings, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act."

This is a limiting section which takes jurisdiction from all Courts, leaving the High Court only with the very limited jurisdiction given by the words "except the High Court on such application as aforesaid." These words plainly refer to an application made under S. 17 of the Act, which runs as follows :

"Any person having an interest in any property in respect of which an order of forfeiture has been made under Ss. 4, 6, 9, 11 or 12 may within two months from the date of such order, apply to the High Court to set aside such order on the ground that the newspaper, book or other document in respect of which the order was made, did not contain any words, signs or visible representations of the nature described in S. 4, sub-S. (1)."

The jurisdiction then which is left to the High Court is a jurisdiction to entertain applications to set aside an order on the grounds indicated in S. 17 of the Act and this jurisdiction is, in my opinion, strictly confined to a consideration of these particular grounds. It has been urged that when an application has been made under S. 17 of the Act, the whole matter is opened up and the High Court have then jurisdiction to consider the correctness or otherwise of the notification. This is not, in opinion, a correct reading of S. 22 itself and that it was not the intention of the Act is clear from the fact that, if it were open to the High Court, on an application under S. 17 of the Act, to consider the whole matter including the correctness or otherwise of the notification, there would have been no object in restricting the scope of an application under S. 17 of the Act. The section would have allowed an application to be made questioning not only the correctness of the interpretation, but also the legality or otherwise of the notification. This was also the

view taken in the case of *Mahomed Ali v. Emperor* (1). It is true that Stephen, J., expressed a doubt on the point, but his doubt was not sufficiently strong to make him dissent from the other two learned Judges. The second point urged before us is that in fact the leaflet does not come within the scope of S. 4, Press Act. There is nothing objectionable in the first five stanzas, which merely depict the state of India as it used to be, but the next eight stanzas describe the present condition of India in the following terms :

"A hell on earth. Having fallen into the hands of foreigners I know no rest even for a moment. I put up with the words of foreigners and also bear their shoes (tramps and kicks,) Dogs eat and I yearn for them. I am being dried up like a milkman's pail."

Mr. Gour Chandra Pal contends that by the expression "A hell on earth," plague, famine, malaria and the recent epidemic of influenza are referred to ; that "having fallen into the hands of foreigners I know no rest even for a moment" refers merely to the trade of the country having been taken by Germans and other foreigners ; that "I put up with the words of the foreigners and also bear their shoes" merely means that Indians by their own fault have become hewers of wood and drawers of water ; that the expression "dogs eat and I yearn for them" refers to the trade of the country having been taken out of the hands of Indians. He has given no explanation of "I am being dried up like the milkman's pail," but presumably he would also interpret this in the same way. He further urges strongly that the fact that in the last stanza the Indians are called on to take courage and be resolute like "Brother Gandhi" shows clearly that the writer had no seditious intention and that on a reasonable interpretation of the whole leaflet it is not seditious and cannot come within the terms of S. 4. We are not concerned with what the intention of the writer may have been and it is doubtful whether we are even concerned with what the reasonable interpretation of the leaflet might be. In the case in *Mahomed Ali v. Emperor* (1) Sir Lawrence Jenkins, C. J., has said :

"It is not enough for the applicant to show that the words of the pamphlet are not likely to bring into hatred or contempt any class or section of His Majesty's subjects in British India, or that they have not a tendency in fact to bring

about that result. But he must go further and show that it is impossible for them to have that tendency either directly or indirectly, and whether by way of inference, suggestion, allusion, metaphor or implication. Nor is that all; for we find that the legislature has added to this the all-embracing phrase 'or otherwise'."

The correctness of this view has been doubted in a later case of *Mrs. Annie Besant v. Government of Madras* (2), but the scope of the section is so wide that the interpretation of Sir Lawrence Jenkins would appear to be justified. In the present case however it is unnecessary to consider this matter because even if we accept the contention of Mr. Gour Chandra Pal that a reasonable interpretation must be put on the leaflet it still clearly comes within the scope of the section. It is impossible to accept Mr. Pal's ingenious interpretations. The leaflet describes India in former days as "A paradise on earth," in which there was no want and in which every one "easily got whatever he wished." It then goes on to describe India now as a "hell on earth" due to having fallen into the hands of foreigners, and finally it invites Indians to combine to remove the distress of the country. To the ordinary reasonable reader "foreigners" can mean nothing but the British Government; the leaflet has a direct tendency to bring Government into hatred and contempt and is clearly within the scope of S. 4.

Manuk, J.—The petitioner, who is the keeper of the Ratnakar Press at Muzaffarpur, applies to this Court under S. 17, Press Act (1 of 1910), to set aside an order of forfeiture passed by the Local Government under S. 4 (1) of the Act, declaring the security of Rs. 500 deposited in respect of the Ratnakar Press forfeited to His Majesty. The reason given for this forfeiture, as set out in the notice required by S. 4 is that the press "has been used for printing a leaflet in Hindi entitled "Ma ki pukar" (Call of the Mother) containing words which are likely or may have a tendency directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise to bring into hatred and contempt the Government established by law in British India or to excite disaffection towards the said Government."

It may be mentioned in passing that the notice also declared the copies of this leaflet forfeited, but no application has been made to us with respect to this part of the first order. The objection taken on behalf of the petitioner is that the notice

is illegal inasmuch as it does not set out the words which in the opinion of the Local Government fall within S. 4, Cl. (1) (c), and it is contended that this Court has jurisdiction under S. 22 to revise on this ground any proceeding purporting to be taken under this Act. Certain passages in the judgment of Stephen, J., in the case of *Mahomed Ali v. Emperor* (1) are relied on in support of this contention. In that case the Court was considering a notification under S. 12 (1) of the Act, which enjoins that the Local Government should state the grounds of its opinion in the notification declaring the newspaper, book or other document forfeited. Sir Lawrence Jenkins, C. J., held that the notification was defective in this material particular, but also held that S. 22 of the Act barred the High Court from questioning the legality of the forfeiture except on the sole ground allowed by S. 17. Woodroffe, J., concurred with the learned Chief Justice; but Stephen, J., seems to have entertained a doubt regarding the limit placed on the High Court's jurisdiction. That doubt however was not sufficiently strong to impel him to differ from the other two learned Judges and hold that the defect in the Notification laid the forfeiture open to revision on this ground by the High Court. In the case of *Mrs. Annie Besant v. Government of Madras* (2) Abdur Rahim, Offg. C. J., held that S. 22 read with Ss. 17 and 19 debarred the High Court from interfering with the order of forfeiture except on one ground, namely, that the extracts in question are not of the nature described in sub-S. (1), S. 4, while Ayling J., at p. 1129, observed that the High Court was a Special Tribunal constituted under a special enactment for a single specific purpose, namely, to determine whether certain words were or were not of the nature described in S. 4, Cl. (1), and Seshagiri Aiyar, J., at p. 1148, ruled to the same effect.

Quite apart from authority however I am of opinion that the learned vakil's contention overlooks the significance, in S. 22 of the words "on such application as aforesaid." These words clearly refer the jurisdiction, to call in question any proceeding purporting to be taken under the Act, back to the application permissible under S. 17, and when we examine S. 17, we find that on one ground and

(2) [1916] 39 Mad. 1085=37 I. C. 525.

one ground alone may an aggrieved person apply to the High Court to set aside an order of forfeiture made under Ss. 4, 6, 9, 11 or 12. The learned vakil, however contends that though the application is limited to one ground, if an application is made under S. 17, the High Court is immediately given jurisdiction under S. 22 to revise the whole of the proceedings. To yield to this contention would be to hold that the positive and particular provisions of S. 17 limiting the right of the aggrieved person were controlled by the negative provisions of a later section, i. e., the second portion of S. 22, barring in general the jurisdiction of all Courts except the High Court "on such application as aforesaid." Such a result would be against all the well-recognized canons of construction. As was observed by the Master of the Rolls in *Pretty v. Solly* (3):

"The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative."

It was next urged that it was unnecessary for the legislature to enact certain safeguards in the matter of the required notice under S. 4, or the notification under S. 12, if indeed the High Court may not revise the proceedings on the ground of neglect to comply with all the requirements of the Act. The answer to this, in my opinion, is that the legislature may well have had present to its mind the necessity of compelling the executive authorities to apply their minds to the facts of each case before taking action, and therefore enacted certain safeguards. In any case it is our duty to interpret the Act and not begin by assuming, as Lord Coleridge, C. J., said in *Reg v. Mansel Jones* (4), what the legislature ought to have done; and in construing the Act we must give effect to every part of the statute even if the consequence be a hardship on individuals.

Moreover, apart from the bar to our jurisdiction to interfere on such a ground I hold that the notice in this case does comply with the provisions of S. 4 (1) and is not defective. The section enjoins that the notice should "state or describe" the objectionable words, etc. It is apparent from the notice that the Local Government took exception to the leaflet as a whole and in these circumstances it

was sufficient that the notice so described the leaflet as to identify it beyond all doubt. In so identifying it, the notice did in fact by implication state the words objected to inasmuch as it objected to all the words taken as a whole. The first contention of the petitioner therefore fails. The next contention has reference to the pamphlet itself. On this topic I need only say that I agree entirely with the judgment passed by the learned Chief Justice and in doing so, speaking for myself, I adopt the principle that the Court has to look to the reasonably possible effects which the words may produce. I concur in the proposed order.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 90

CHAPMAN AND ATKINSON, JJ.

Lachminarain Agarwala—Petitioner.
v.

Thakurhari Dutta—Opposite Party.

Civil Revn. No. 216 of 1917, Decided on 1st February 1919, against order of Addl. Deputy Commr., Manbhum, D/- 18th April 1917.

Chota Nagpur Tenancy Act (1908), Ss. 177, 218 and 224 — Suit for rent—Third party claiming right to receive rent—Appeal from decision lies to Deputy Commissioner and not to Judicial Commissioner.

Section 177 provides for the decision of rent suits, in which a third party who claims the right to receive rent from the tenant is impleaded, without deciding the question of title. The section requires the Court to dispose of the matter merely upon a decision of the question as to who had actually under good faith received and enjoyed the rent before the institution of the suit. No question of title to or interest in the land is decided in such a case. Therefore an appeal from the decision in such a suit lies to the Deputy Commissioner and not to the Judicial Commissioner. [P 91 C 1]

Sisir Kumar Mitter—for Petitioner.

D. N. Sircar and Abani Bhusan Mukherji—for Opposite Party.

Chapman, J.—This application in revision has been made by the plaintiff. He sued the defendant for the recovery of rent. The defendant pleaded that the rent was payable to a third party named Raghunath Hazra. Raghunath Hazra was accordingly made a party under S. 177, Chota Nagpur Tenancy Act. The suit ended with the decision that the rent was payable to Raghunath Hazra. There was an appeal to the Deputy Commissioner which was dismissed.

We are asked in revision to interfere on the ground that the appeal did not lie

(3) [1859] 26 Beav. 606.

(4) [1889] 23 Q. B. D. 39.

to the Deputy Commissioner but to the Judicial Commissioner under S. 218 read with S. 224, Chota Nagpur Tenancy Act. S. 177 of the Act however which is referred to in the judgment provides for the decision of cases such as this without deciding the question of title.

That section requires the Court to dispose of the matter merely upon a decision of the question as to who had actually under good faith received and enjoyed the rent before the institution of the suit. That was all that was actually decided in this case. No question of title or interest to the land was in our opinion decided. That being so, in our view the appeal lay to the Deputy Commissioner. The other point taken in revision is with reference to an order of the first Court refusing an adjournment, which was prayed for in order that a warrant should issue for the arrest of a witness who had ignored the process of the Court. It is true that the first Court, who appears to have erred in not taking any steps on the report of the peon, is open to censure on that ground, but as that point was not taken in appeal to the Deputy Commissioner, we are unable to interfere in revision. The application is rejected with costs.

Atkinson, J.—I agree.

V.S./R.K. *Application rejected.*

A. I. R. 1919 Patna 91

DAS, J.

Ram Charitar Kahar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 114 of 1919, Decided on 8th May 1919, against order of Addl. Dist. Magistrate, Patna.

Police Act (5 of 1861), S. 34 (7)—Ingredients of offence.

Unless it is proved that an act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under S. 34. [P 92 C 1]

Hasan Imam, Sarat Kumar Banerji, D. N. Sircar, Abani Bhusan Mukerji and Panchanan Banerji—for Petitioner.

Judgment.—This application is directed against an order of the Additional District Magistrate of Patna convicting the petitioner under S. 34, Police Act, and sentencing him to pay a fine of Rs. 2. The petitioner was, in the first instance, tried for an offence under S. 34, Bye-Laws of the Patna Administration Com-

mittee and was convicted under that section by a Deputy Magistrate and was sentenced to pay a fine of Rs. 2. There was an appeal to the Court of the Additional District Magistrate of Patna, who, in view of the fact that sanction had not been obtained for trying the petitioner under S. 34 of the Bye-Laws of the Patna Administration Committee, set aside the conviction under that section, but convicted him, as I have stated, under S. 34, Police Act, and imposed a fine of Rs. 2 on the petitioner. S. 34, Police Act, provides that

"Any person who, on any road or in any open place or street or thoroughfare within the limits of any town to which this section shall be specially extended by the Local Government, commits any of the following offences, to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers shall, on conviction, before a Magistrate, be liable to a fine."

The offence of which the petitioner has been convicted is set out in Cl. 7, S. 34, which runs as follows:

"Any person who wilfully and indecently exposes his person, or any offensive deformity or disease, or commits nuisance by easing himself, or by bathing or washing in any tank or reservoir not being a place set apart for that purpose."

It will be noticed therefore that before a person can be convicted under S. 34, Police Act, it must be established that the act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers. It is not suggested that the act complained of was to the obstruction, inconvenience, risk, danger or damage of any person, but it is suggested by the judgment of the learned Additional Magistrate that it was presumably to the annoyance of the residents or passengers. There is absolutely no evidence on the record that the act complained of was to the annoyance of the residents or passengers, nor, as I read the judgment of the Additional District Magistrate, does he say that there is any evidence on the record to that effect; but he comes to the conclusion that the act having been proved, it must have been to the annoyance of the passengers. I cannot assent to the proposition that we are at liberty to assume the existence of that which the legislature says is an essential ingredient of an offence. It is not without some reason that the legislature has laid down certain conditions precedent for a conviction under S. 34,

and it seems to me that if the learned Additional District Magistrate's view of law be correct, then the following words appearing in the section, "to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers," are purely ornamental and therefore wholly unnecessary for the purpose of legislation. I hold that unless it is proved that the act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers, there cannot be a conviction under S. 34, Police Act.

There is absolutely no evidence on the record to show that there was any resident or passenger present at the time when the act complained of took place, nor that it took place within sight of any resident or passenger nor that any annoyance was caused to any resident or passenger. It is also very doubtful if the place where the act complained of took place is visible from the public road as the two witnesses called by the prosecution contradict each other on this point. In my view therefore the conviction under S. 34, Police Act, cannot be sustained. In view of this finding, it is unnecessary to consider the other points that have been argued by Mr. Hasan Imam. I would set aside the conviction and sentence passed on the petitioner and direct that the fine, if paid, be refunded.

V.S./R.K. *Conviction set aside.*

A. I. R. 1919 Patna 92

DAWSON-MILLER, C. J. AND COUTTS, J.
Mt. Bibi Nabi Zohra—Appellant.

v.

Baijnath Goenka—Respondent.

Privy Council Appeal No. 65 of 1917,
Decided on 10th February 1919.

Civil P. C. (1908), S. 110 and O. 45, Rr. 4, 7 and 8—Appeal to His Majesty in Council—Two appeals consolidated for purposes of pecuniary valuation—Security must be deposited in respect of both appeals—Security furnished only in one—Both appeals will be stayed.

The applicant referred to in R. 7, O. 45, is the appellant and where there are two or more appellants whose appeals must be consolidated before the conditions necessary for granting the application are fulfilled, the security required by the rule is the whole security and not merely the security which the appellants in one of the appeals have to furnish. [P 93 C 1]

Where two appeals are consolidated for purposes of pecuniary valuation and a certificate is granted that the consolidated appeals comply with the provisions of S. 110 and are fit ones for appeal to His Majesty in Council, security for costs must

be deposited in respect of both the appeals, and in default of furnishing such security the appeals will be stayed. If security is furnished only in one appeal both the appeals lose the character of consolidated appeals, and as neither of them separately would comply with the provisions of S. 110 of the Code both are liable to be stayed in default. [P 92 C 2]

Sultan Ahmad and Muhammad Tahir
—for Appellant.

Hasan Imam—for Respondent.

Judgment.—The applicant in this case is Mt. Bibi Nabi Zohra. Her petition of appeal to His Majesty in Council was filed on 31st October 1917. Thereafter a question arose as to the amount or value of the subject-matter in dispute, and on 5th December 1917 the matter was referred to the trial Court to determine such amount or value and report thereon. On 16th January 1918 the Court reported that the amount of the subject-matter in dispute was Rupees 8,898-14-0 or less. A petition in objection to that report was subsequently filed by the applicant. On 23rd July 1918 before the objection to the report was heard, the applicant filed a petition praying that this appeal numbered 65 of 1917, and Appeal No. 75 of 1917, which arose out of the same judgment and involved substantially the same questions for determination, should be consolidated for purposes of pecuniary valuation. A similar report as to the amount or value in Appeal No. 75 had also been made, and it appearing that the total value of the two appeals amounted to over Rs. 10,000 this Court made an order, dated 30th July 1918, consolidating the two appeals for purposes of pecuniary valuation, and granting a certificate that the consolidated appeal complied with the provisions of S. 110, Civil P. C., and was a fit one for appeal to His Majesty in Council. The appellant in Appeal No. 65 in due course furnished the security required from her for the respondent's costs and deposited the amount estimated for printing and transmitting the record under O. 45, R. 7, but her co-appellants in Appeal No. 75 failed to file the security required from them, and the appeal, so far as they were concerned, was stayed for default. The case now comes before us on the question whether, notwithstanding that a certificate has been granted to the effect that it fulfils the requirements of S. 110, Civil P. C., the appeal should be allowed to proceed and

be finally admitted, seeing that the subject-matter of the appeal no longer fulfils those requirements. The applicant relies upon O. 45, R. 8 which provides that

"where such security has been furnished and deposit made to the satisfaction of the Court the Court shall, inter alia, declare the appeal admitted."

The learned Government Advocate, on her behalf, contends that the Court, having granted the certificate on grounds which at the time it was granted could not be impeached, all that remained to be done so far as the present appellant is concerned was to comply with the provisions of R. 7, O. 45; and, as this has been done, the Court is bound by R. 8 to admit the appeal. It is admitted that the Court has power to review its own order, but only on grounds which would have been applicable at the time the order was made; and that, once the certificate is granted, the appellant has a sort of vested right of which no subsequent events can deprive her if the conditions imposed by R. 7 are fulfilled. Whatever merit that argument may have it is first necessary to see whether the conditions have, in fact, been complied with. It must be borne in mind that, apart from the assistance of the appellants in Appeal No. 75, this appeal never could have been launched at all, and, having invoked the appellant in Appeal No 65 is necessarily dependent upon their co operation to see that the rules are obeyed. The certificate relied on was to the effect that the consolidated appeal complied with the provisions of S. 110 and was a fit one for appeal to His Majesty in Council. Such an appeal no longer subsists. The certificate that a consolidated appeal complies with the section does not entitle the appellant to a final admission of an appeal which has ceased to bear that character. The applicant referred to in R. 7 is the appellant, and where there are two or more whose appeals must be consolidated before the conditions necessary for granting the application are fulfilled, I think the security required by R. 7 is the whole security in such a case and not a portion only of that which the appellants together have to furnish. In the present case that security has not been furnished within the meaning of R. 8, and the Court in such a case cannot admit the appeal. It may be unfortunate for the

present appellant that through no fault of hers her partners in litigation have failed her at the eleventh hour, but this is one of the risks she bears as the price of their assistance. To decide otherwise would, I think, be contrary to the spirit and meaning of the rules. It would open the door so as to admit appeals in many cases where the provisions of S. 110 as to value were not in fact complied with, if the only requisite necessary to surmount the obstacle presented by that section were the temporary assistance of a co-appellant who could retire when no longer needed.

The learned Government Advocate has asked us to allow him an opportunity of proceeding with his objection to the report of the Subordinate Judge as to the value of the subject-matter of his appeal, which was not pressed after the consolidation order made that course unnecessary. I think in the circumstances which have arisen the application is reasonable. The order of the Court will be that this appeal be stayed save in so far as may be necessary to determine the applicant's objection to the report of the Subordinate Judge as to the value of the subject-matter of the appeal. On the determination of that matter let the case come before the Bench for further orders. The applicant will bear the costs of the present application.

V.S./R.K.

Appeal stayed.

*A. I. R. 1919 Patna 93

ATKINSON AND DAS, JJ.

Patto Kumari—Plaintiff—Petitioner.

v.

Upendra Nath Ghosh—Defendant—Opposite Party.

Civil Revn. No. 275 of 1918, Decided on 17th February 1919, to revise decision of Sub-Judge, Rajmahal, D/- 20th August 1918.

* (a) Civil P. C. (1908), Sch. 2, Para. 15—Award given after time is not nullity but only voidable.

Paragraph 15, Sch. 2, does not render an award made out of time per se a nullity : the award is merely voidable, and if not sought to be set aside within ten days from the time when it is filed, it is binding upon the parties. [P 95 C 2]

* (b) Civil P. C. (1908), Sch. 2, Paras 8 and 15—Though it is Court's discretion to extend time, still that discretion does not negative right to extend time by agreement acquiesced in between parties to arbitration.

The Court is the person primarily designated and intended by para. 8, Sch. 2, to be the source by whose authority the time for making an award

is to be enlarged. The power vested in the Court under that rule is permissive and discretionary, but it does not negative the right to extend the time by agreement impliedly agreed to and acquiesced in between the parties to the arbitration proceedings. [P 96 C 1 2]

Where parties attend and recognize that the arbitrator has jurisdiction to continue the arbitration, even though the time for making the award has expired, they are estopped by their conduct from seeking to impugn the award on the ground that it was invalid by reason of being filed out of time [P 98 C 2]

The Court in inquiring into the question whether an award is voidable or not as having been made out of time, has to consider mixed questions of law and fact, and if in the exercise of its jurisdiction it decides honestly some matters of law or fact erroneously even though such decision may involve a determination as to the regularity or irregularity of some method of procedure, this determination would not necessarily render applicable the provisions of S. 115, Civil P. C.

[P 98 C 2 P 99 C 1]

Hasan Imam and Gangadhar Das—for Petitioner.

Lalit Mohan Ghose—for Opposite Party.

Judgment.—This application in civil revision is made to us from an order made by the Subordinate Judge of Rajmahal dated 20th August 1918. It is necessary to state the facts out of which the necessity for the present application has arisen. A suit was instituted in which Bibi Patto Kumari was the plaintiff, and Upendra Nath Ghosh was defendant. The plaintiff was the mother of her minor son, who succeeded to the business of Gopal Chand Rai-Darhanpat Singh Baldeo. The defendant was the head gumashta of the business during the lifetime of the minor's father. It is suggested that after the minor's father died, it was found that the defendant had been guilty during the minor's father's lifetime of various acts of dishonesty; and that he had misappropriated moneys belonging to the firm. The allegation by the plaintiff is that the defendant, having been brought to book by her, as guardian of the minor on the death of her husband, consented to execute a hand note to secure the loss sustained by the firm by reason of his alleged defalcations estimated at a sum of Rs. 5,000. The hand-note was executed by the defendant in favour of the minor; and was dated 21st October 1912. When the hand-note came to maturity, it was presented for payment and dishonoured, the defendant having failed to pay the sum of Rs. 5,000 due thereon; whereupon the plaintiff, as guardian of her minor son instituted a

suit in the year 1915 against the defendant to recover the amount due on the aforesaid hand-note. The aforesaid suit has been referred to in this application as Money Suit No. 2 of 1915.

For three years the suit lay in abeyance; and nothing active was done. The mother of the minor was plaintiff in the suit; and Upendra Nath Ghosh, the former head gumashta of the old firm, was defendant. Accordingly litigation having become more or less unsatisfactory, the parties agreed on 26th February 1918 to submit their differences in that suit to arbitration as being the most competent and convenient form of tribunal to determine and decide the issues in dispute between the parties thereto. The arbitration naturally involved, having regard to its character, the taking of an account; coupled with evidence to prove and to establish that there had been misappropriation of the firm's moneys by the defendant. The Court in which the suit was instituted was willing that the matter in dispute between the parties thereto should be referred to arbitration; and an order was made by the Court on 26th February 1918, referring the matters in issue to the arbitration of the persons selected and nominated by the parties to the original suit; and the 25th March 1918 was fixed as the date within which the arbitrators should make their award. Four persons were named as arbitrators; and they all appear to have been gentlemen of worth and position and residents of the district in which the parties to the suit resided, with a knowledge of commercial dealings and the methods of book-keeping. A short time after the matters in dispute had been referred to arbitration, it became quite evident that the arbitrators could not make their award within the time specified by the order of the learned Subordinate Judge dated 26th February 1918 under R. 3, Sch. 2, Civil P. C., and accordingly the learned Subordinate Judge enlarged the time for the arbitrators making their award, for reasons which appeared satisfactory to him, to 25th June 1918. The award however was not made within that time. The award was actually made on 10th July 1918 and filed in Court on 12th July 1918.

It is contended before us that inasmuch as the arbitrators failed to make their award within time, that is to say, within

or by 25th June 1918, that therefore the learned Judge had no jurisdiction or option under the rules of the Civil Procedure Code save and except to set aside the award which was made out of time and filed on 12th July 1918. If the case stood alone on these facts, there might be some force in the contention presented on behalf of the petitioner. It is necessary however to consider the provisions of the rules with regard to the procedure applicable to arbitration proceedings under the Civil Procedure Code. R. 1 gives the Court power, when the parties agree to refer a matter pending before a Court of civil jurisdiction to arbitration. R. 3 provides that an order of reference shall be made, and that a time shall be specified within which the arbitrators shall make their award. R. 8 provides that if the award cannot be made within the time specified by the Court by its first order of reference, then the time may be enlarged by the Court from time to time, until such time as the Court shall think fit. R. 15 is the one mainly material for the purposes of our consideration. R. 15 of the present Code differs materially from the old S. 521 of the prior Code. R. 15, Sch. 2, Civil P. C., is the rule or order which confers jurisdiction upon Courts acting within their discretion to set aside awards, if an application be made within the time limited, for setting aside an award upon any of the three grounds specified in that rule. Admittedly the present application, so far as the argument addressed before us is concerned, is conversant only with the latter portion of the cause provided for setting aside an award specified in sub-Cl. (c), R. 15, and summarized, the contention is as follows:

That inasmuch as the award was made late and out of time, consequently the award itself is per se void and a nullity; and that therefore there was no jurisdiction in the Court to hold that the award could be operative or binding upon the parties, it having been made out of time, viz., at a date later than 25th June 1918. Now the essential difference between the old Code and the new Code appears to be this: that whereas the old Code by S. 521, Civil P. C., expressly made an award out of time a nullity, the existing rule varies the old section of the prior Code, by providing that if an award is made out of time it only affords a

ground or reason for setting aside the award if the parties so desire to assert the right; provided the Court acting within its discretion is satisfied that the ground upon which the validity of the award is impeached is just and fair, and that in equity and fair dealing it ought and should be set aside. R. 15 therefore does not render an award made out of time per se a nullity; it is merely voidable, and if not sought to be set aside within 10 days from the time when the award is filed, it is binding upon the parties thereto notwithstanding its infirmities.

Sir Lawrence Jenkins laid down this principle in the case reported as *Shib Kristo Daw & Co. v. Satish Chandra Dutt* (1), and authority will also be found in support of the same proposition in the case reported as *Khan Singh v. Mohan Lal* (2) and in which Rattigan, C. J., referring to the decision of Sir Lawrence Jenkins, already cited, is reported as stating:

"This exposition of the law accords, if I may venture to say so, with my own views as to the proper interpretation of para. 15, Sch. 2 of the present Civil P. C.; and I accordingly hold that the award before me, though made after the expiration of the period fixed by this Court, was not a mere nullity, and at most was liable to be set aside upon an application by one or other of the parties affected thereby."

It is essentially necessary, in another aspect of this case, to consider and understand exactly the purport and effect of the provisions of R. 15, Sch. 2, Civil P. C. Mr. Hasan Imam's contention in this application is mainly founded upon the wording of R. 8, Sch. 2, Civil P. C. He contends that when the time for making the award has expired that then the Court only has the power to extend or to enlarge the time for making the award by the arbitrators; and that even then the Court has not got such power when the award itself has been made out of time, and before which time no application has been made to and granted by the Court enlarging the time for making the award; and he relies in support of this proposition upon the judgment of Sir John Harrington: *Shib Krishna Daw & Co. v. Satesh Chunder Dutt* (3). It is unnecessary for us in this case to consider the propriety of that decision; but speaking for myself I think it is open to

(1) [1913] 39 Cal. 822=18 I. C. 69.

(2) [1917] 34 I. C. 177.

(3) [1911] 38 Cal. 522=12 I. C. 13.

exception; because if you can extend the time for making an award after the time has already expired for so doing, I cannot understand, on principle, why you cannot extend the time even after the award itself has been made, even if made out of time; and it appears to me that R. 8, Sch. 2, Civil P. C., may be fairly interpreted as contemplating even such a contingency. On the corresponding English enactment in *pari materia* with the rules as to arbitrations provided by the Civil P. C., it has been so held: *Parker v. Smith* (4), *May v. Harcourt* (5), *Lord v. Lee* (6) and *Warner, In re* (7). However the main contention before us, asserted by Mr. Hasan Imam, is that the jurisdiction to extend the time or to enlarge the time is vested only in one person, viz., the Judge as a Court. R. 8 provides

"that the Court may, if it thinks fit, either allow further time, and from time to time either before or after the expiration of the period fixed for the making of the award, enlarge such period."

Mr. Hasan Imam contends that this is a statutory obligation and duty; and that it must be performed by the person or forum nominated by what is in effect a statute; and that it is not open or possible to enlarge the time for making an award by any collateral means whatsoever, whether arising from the conduct of the parties or otherwise. I agree with Mr. Hasan Imam's argument to this extent: that I think that the Court is the person primarily designated and intended to be the source by whose authority the time is to be enlarged. I am of opinion that if the arbitration proceedings in this case had been conducted with any degree of regularity and propriety, the parties thereto would have applied to the learned Judge as the person empowered by statute to enlarge and extend the time to validate the award. But I cannot accede to the argument that the function vested in the Court, as to its right to enlarge the time for making an award under R. 8, is mandatory and imperative and that no other circumstances can be fairly considered, arising from the conduct of the parties, which would justify an inference that the parties intended and impliedly agreed that even though the time for making the award

was not extended by the Court, that the arbitrators could not make their award even though literally out of time. The power vested in the Court is discretionary and permissive, but it does not negative the right to extend time by agreement impliedly agreed to and acquiesced in between the parties to the arbitration proceedings.

Whatever be the true construction of R. 8, we feel also obliged to consider the conduct of the parties to the arbitration prior and subsequent to 25th June, with a view of seeing whether established principles of law are applicable to cases such as the present, which enable Courts of justice, in the exercise of their equitable jurisdiction, to overcome technicalities and maintain the validity of an award, though literally voidable by the commission of some error in the making and framing of the award itself. The time ultimately fixed by the Court for making the award was 25th June. The plaintiff applied to the arbitrators on 16th June for time asking by her petition for a week's adjournment. A week's adjournment was granted; and an adjournment was allowed up to 20th June. On 23rd June the plaintiff filed a further petition seeking an adjournment. By this petition the plaintiff applied for a fortnight's time. The plaintiff must be deemed to have known that when her advisers applied on 23rd June for a fortnight's adjournment, that they were applying for an adjournment of the hearing of the arbitration proceeding to a date long after the date fixed for the making of the award by the arbitrators. The arbitration Court considered the application for the adjournment applied for by the plaintiff on 23rd June; and adjourned the further hearing of the arbitration proceedings to 7th July 1918. The reasons which induced the plaintiff to apply for an adjournment on 23rd June are fully set out in her petition; and the arbitrators in yielding to the prayer of the petitioner stipulated by their order that the plaintiff was to pay as and for the costs of the adjournment the sum of Rs. 30. It is suggested in the above-mentioned petition that the arbitration proceedings, between 16th and 28th June, were adjourned by the act of the arbitrators, behind the back of the petitioner, to 7th July. I find no warrant in support of this contention, save and except the

(4) [1850] 15 Q. B. 297.

(5) [1884] 13 Q. B. D. 688.

(6) [1868] 3 Q. B. 404.

(7) [1867] 3 Eq. 261.

uncontradicted averment contained in the plaintiff's petition of 23rd June. There is no entry in any record made by the arbitrators allowing any adjournment to 7th July, save and except the order made on 23rd June referred to above on the plaintiff's petition.

The plaintiff having secured the adjournment she desired to 7th July, appeared on that day before the arbitration Court, and proceeded to examine witnesses and to present further facts in evidence in support of her case for the arbitrators' consideration. It would appear that the hearing of the arbitration finally concluded either upon 7th July or 8th July, and the arbitrators after a short interval for consideration made their award on 10th July; and this is the award the validity of which is sought to be impeached by this application. The award is short; and in its effect it dismisses the plaintiff's claim as being unsupportable and founded upon improbabilities, and probably fraudulent in its conceptions. Now though one may admit that the civil Court is the proper authority to extend the time within which an award is to be made by arbitrators, if a regular method of procedure was pursued, yet I think there is a rule well recognized and established, in the nature of an estoppel, that if the parties to an arbitration proceeding by their conduct lead arbitrators to think and believe that even though the time for making their award has in fact expired, that they (the arbitrators) should continue the proceedings, and to which course the parties must be deemed to have assented, by acquiescing in taking part in such proceedings; that then, though the time for making the award may have expired, the jurisdiction of the arbitrators would be deemed to continue to validate and give effect to the award. Courts of justice and equity have held that such conduct on the part of the parties to an arbitration estops them from impeaching the award upon the ground that it is invalid or could be fairly set aside on the mere technical ground that the award itself was merely made out of time.

There is a long uniform line of authority to be found in the English cases supporting this view of the law. I shall refer to one or two.

It is difficult to distinguish the English cases in principle from the law appli-

cable to arbitration proceedings in India; because the Civil Procedure Code is very much akin, and very alike, in its terms to the procedure provided by the corresponding statute in England, generally known as the Common Law Procedure Act, which applies to arbitration proceedings of such a character as we have in this case; viz, arbitration proceedings in respect of a matter which affects the subject-matter of a suit pending before a Court of justice.

If the law in this country is founded upon equity and good conscience I see no reason why we should not apply the principles laid down by the authority of English case law sanctioned by a host of great and distinguished Judges, to the law applicable to arbitration proceedings in this country, when the Acts regulating the procedure of arbitration Courts in both countries are analogous and akin one with the other; and why we should not also apply the equitable doctrines which have been applied and administered by the Court of Chancery in England in such matters for well nigh 100 years. If the law in this country is to be administered on the basis of equity and good conscience, then certainly I say it is not equity, nor is it in keeping with good conscience that a party to an arbitration proceeding should invite a Court of arbitrators to do a certain act for his benefit and advantage; and when he has gained such benefit and advantage, but failed to secure final success in the proceeding itself, that such person should be permitted to repudiate the award of the arbitrators solely and only on the ground that, because the arbitrators conceded to him the benefit he sought, and of which he availed himself; that thus their award is so vitiated by such transparent illegality as to coerce a civil Court to set aside the award so made. To my mind such conduct, if permitted would lend sanction to a fraud being committed on the arbitrator, and would be grossly unjust and inequitable towards the other party to the arbitration proceeding who by consenting to the arbitrators continuing to act, whether expressly or impliedly has acquired by the result of the proceedings a valuable right of which he ought not to be hastily deprived.

I desire to refer in support of our view to the well-known case of *Tyerman*

v. *Smith* (8). It is necessary to observe that in the several cases I shall cite it will be found that the cases mainly turned for their decision upon the provisions applicable to arbitration proceedings under the Common Law Procedure Act which contains provisions and a procedure very analogous to that provided by the Code of Civil Procedure. That statute, that is to say, the Common Law Procedure Act, provides that every arbitration award to be made by arbitrators to whom a reference has been made under that statute must be made within one month after the arbitrators have been appointed unless the time is enlarged in accordance with the provisions of the statute. Unless the statutory provisions are complied with the award is liable to be set aside; or the Courts may, while refusing to enforce it by attachment or otherwise decline to set it aside.

In *Tyerman v. Smith* (8) the award was not made for three months after the time provided by the statute; and the reason for the delay was because the parties had by their conduct acquiesced in the arbitrators continuing to exercise their jurisdiction by proceeding with the arbitration, and in making their award out of time, and the Court in that case presided over by the three distinguished Judges, Lord Campbell, Coleridge and Erle, laid down what has been consistently followed since in later cases as the guiding rule to be applied in such circumstances. Lord Campbell says:

"I proceed on the ground that the plaintiff is estopped by his conduct from objecting that there was no written consent for the enlargement of time. It is contended that the statutable authority does not exist. I think the plaintiff is estopped from saying that there was no such written consent as was essential to the statutable authority."

In *Watson v. Bennet* (9) a similar principle was applied to similar facts, and Lord Bramwell in that case said:

"Assuming that Mr. Gray is right in the suggestion that by the order of reference made by my brother Channell, the arbitrator's power was regulated by S. 15, and that, notwithstanding the special clause in this order, he had no power of enlarging the time other than that given by that section, and assuming that there was no valid enlargement under that section, and that the parties by their conduct have done no more than consent to proceed after the three months, still the award may be good. It may be that attending before the arbitrator after the arbitrator's

powers had ceased was evidence of a new parol submission. If there was a good parol submission, though the award may not be enforceable under the statute, it may be capable of being enforced by action; therefore it is clear that we ought not to set it aside."

The following authorities may also be referred to: *Reade v. Dutton* (10), *R. v. Hill* (11) and *Hick, In re* (12). In *Earl of Darnley v. London, Chatham and Dover Railway Co.* (13), their Lordships of the House of Lords recognized this principle as applicable to arbitration proceedings. They distinguished the case then before them in its facts from the decision in *Hick, In re* (12), which was then under consideration; and at p. 57 of (1867) 12 H. L. of the report the Lord Chancellor says:

"This is not at all like the case which was cited in argument where an arbitrator not having enlarged the time for making his award, the parties notwithstanding attended meetings and were thereby held to have recognized his authority as continuing."

The principle underlying these decisions appears to be that where parties attend and recognize that the arbitrators have jurisdiction to continue the arbitration, even though the time for making the award has expired, that then they are estopped by their conduct from seeking to impugn the arbitrator's award on the ground that it is invalid by reason of being out of time. Therefore we think that, on the patent facts of this case, that the petitioner is estopped from impeaching the award made upon the 10th July on the ground that it was out of time, no order enlarging the time for making the award having been made by the Court under Sch. 2, R. 8 (2), Civil P. C. For these reasons therefore we think that the learned Judge was right and justified in law in arriving at the conclusion he did on the facts, and that his order has not been vitiated by any illegality which would justify our interference in civil revision. However we are of opinion that in an application in civil revision under S. 115, Civil P. C., the petitioner is not entitled to the redress she seeks in a case such as the present. I have already pointed out that an award under R. 15, Sch. 2, Civil P. C., is not per se void, but it is only voidable. Considering whether an award is voidable or not,

(8) [1856] 6 El. and Bl. 719.

(9) [1860] 5 H. and N. 831.

(10) [1836] 2 M. & W. 69.

(11) [1819] 7 Price 636.

(12) [1819] 8 Taunt 694.

(13) [1867] 2 H. L. 43.

the Court in inquiring into such a matter has to consider mixed questions of law and fact. If a Court bona fide in the exercise of the jurisdiction, which it undoubtedly possesses in such cases, decides honestly some matters of fact or law erroneously, even though such decision may involve a determination as to the regularity or irregularity of some method of procedure, this determination would not necessarily render applicable the provisions of S. 115, Civil P. C., because a Court having jurisdiction even if it erroneously exercises such jurisdiction honestly but mistakenly, such fact would not necessarily justify interference by the High Court in civil revision under the powers conferred by S. 115, Civil P. C. The Privy Council have more than once laid it down that a Tribunal having jurisdiction is at liberty to decide a point of law or fact erroneously without having its decision open to review in civil revision.

Accordingly for this reason also we are of opinion that this application must fail. We think this application was improperly admitted in the first instance and we dismiss it now with costs measured at a sum of three gold mohurs.

V.S./R.K. *Application dismissed.*

*** A. I. R. 1919 Patna 99**

ATKINSON AND MANUK, JJ.

Girija Kuer — Judgment-debtor—Appellant.

v.

Secy. of State—Decree-holder—Respondent.

Appeal No. 168 of 1918, Decided on 11th February 1919, from original order of Sub.-Judge, Saran, D/- 25th March 1918.

* Civil P. C. (1908), O. 33, Rr. 10 and 13—Crown unable to realize dues on foot of personal remedy—It has rights to recover from property recovered by pauper without instituting separate suit.

Order 33, R. 10 creates two distinct, independent and separate rights and remedies. The first is a right in personam as against the individual ordered to pay by the decree, and the second a right in the nature of a right in rem as against the property recovered in the suit, which is charged with the liability to pay and satisfy the court-fees properly due and payable to the Crown. In the event of the Crown being unable to effect a realization of the dues payable to it on foot of the personal remedy afforded by the decree, it has a right to recover them from the property recovered by the pauper in the original suit in an execution proceeding without the necessity of instituting a separate suit. As a matter of fact

R. 13, O. 33 of the Code operates as a bar to the institution of a suit, whether by the Crown or by any other person. [P 101 C 1]

Rajendra Prasad—for Appellant.

Govt. Pleader—for Respondent.

Atkinson, J.—This miscellaneous appeal comes before us from an order of the learned Subordinate Judge of Saran, dated 25th March 1918, dismissing a petition of objection filed on behalf of Mt. Babui Girija Kuer in an execution proceeding instituted at the instance of the Secretary of State under O. 33, R. 10. It is necessary to state shortly the facts which have given rise to the present miscellaneous appeal. The plaintiff in Suit No. 235 of 1916 was a pauper and obtained leave to sue in forma pauperis, and as a consequence the plaintiff in that suit was exempt from the payment of court-fees. The suit was one for a declaration of title coupled with a claim for recovery of possession of certain property. The suit was not contested by the defendants, with the result that the plaintiff obtained an ex parte decree, and in fact succeeded in her suit and eventually recovered possession of the property which she claimed.

The decree was passed by the learned Subordinate Judge of Chapra on 28th June 1916, and that decree provided "that the cost of Government be recovered from defendant 1." This reference to the "costs of Government" referred to the court-fee which would have been payable had the plaintiff not sued in forma pauperis, and the total amount of court-fee which would have been payable to Government under such circumstances would have amounted to the sum of Rs. 540-8-0. The Government endeavoured to effect their remedy and right as against defendant 1 for recovery of the court-fees due pursuant to the aforesaid order of the learned Subordinate Judge. Government proceeded to enforce the personal remedy conferred by the decree as against defendant 1, and having made two attempts at execution as against the property of defendant 1, nothing was realized on foot of the execution proceedings instituted by the Crown; and consequently both applications for execution presented on behalf of Government were struck off. The property of defendant 1 was so heavily encumbered that it was worthless in value. Government now apply, by petition, for leave to enforce

their rights under O. 33, R. 10, Civil P. C., and seek an order that the amount due for court-fees may be realized by the attachment and the sale of the property mentioned in the petition, in respect of which Mt. Babui Girija Kuer brought the original suit and obtained a decree in respect thereof as a pauper.

In response to that petition the original plaintiff, Mt. Babui Girija Kuer, filed a petition of objection, alleging that the Secretary of State was not entitled to recover from her the amount of court-fees claimed; and that the proceeding instituted by the Secretary of State was irregular and contrary to law; and that he had no charge on the property recovered by her in the original suit. When the petition on behalf of Government came on for hearing the objector failed to appear to substantiate the petition of objection filed by her and the learned Subordinate Judge for the time being dismissed the petition of objection by his order dated 25th March 1918, and granted the prayer of the petition filed on behalf of Government. These facts are not in controversy and are admitted between the contending parties before us. O. 33, R. 10, which deals with suits instituted by persons in forma pauperis, provides as follows:

"Where the plaintiff succeeds in the suit the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same and shall be a first charge on the subject-matter of the suit."

Thus under this rule of O. 33 the Government seek to enforce their right to recover court-fees as a charge upon the subject-matter of the property recovered in the suit instituted by the plaintiff. The personal order to pay the court-fees due as provided by the decree as against defendant 1 has proved utterly infructuous.

The contention on behalf of the objector, who is represented before us by Mr. Rajendra Prasad, is that the Secretary of State's only remedy to recover the court-fees rightly claimed by the Crown is by a separate suit to raise the amount of the Crown dues charged by statutory operation and effect upon the property recovered by the plaintiff in the original suit. Secondly, it is contended, that if the property that has been recovered is by law impressed with a charge in favour of the

Crown for court-fees, then it is only impressed with that charge so long as the property remains in the possession of the person against whom a personal order or decree has been made to pay such court-fees. And thirdly, it is contended that owing to the amendment of the old Civil P. C., and by the express wording of R. 10, O. 33, as compared with S. 411 antecedent of the Code of 1882, that the personal right to recover the court-fees as against the party who may be ordered to pay such sum as may be due, is in respect thereof distinct and severable and independent of the right created by the existing rule, whereby the property is impressed with the charge due to the Crown in respect of the court-fees legally and properly payable. The first argument, viz., that the Secretary of State must proceed by independent suit to recover the amount of the court-fees charged upon the property recovered in the original suit, is, we think, unsustainable: firstly, because a similar argument was raised and discussed in the case of *Ram Das v. Secretary of State* (1), in which it was held by the learned Judges of the Allahabad High Court that the remedy as against the property impressed with liability as a charge for the payment of the court-fees due to the Crown in suits properly instituted by paupers need not be enforced by separate suit but might be enforced by an application in an execution proceeding or application made to the Court executing the original decree.

Mr. Rajendra Prasad admits that that decision covers this case, but he contends that by reason of the alteration in the wording of R. 10, O. 33, when compared with S. 411 of the prior Code, a change has resulted which radically alters and varies the rights and remedies of the Crown in cases such as the present. The old section contained the words:

"And such amount shall be a first charge on the subject-matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same."

It is contended that the words "shall also" in S. 411 of the Code of 1882, having been omitted in R. 10, O. 33 of the present Code, that thus the rights of the Crown have been altered and varied in the assertion of what is regarded as two respective but separate rights, one as against the person ordered personally to

(1) [1896] 18 All. 419.

pay by the decree; and the other as against the property which has been recovered, and in respect of which the charge is created by what is in effect a statutory provision. We are of opinion that the omission of the word "also" from O. 33, R. 10, Civil P. C., has not the significance or the effect contended for by the learned counsel appearing on behalf of the objector. We are of opinion that O. 33, R. 10, creates two distinct, independent and separate rights and remedies. The first is a right in personam as against the individual ordered to pay by the decree; and the second, a right in the nature of a right in rem as against the property recovered in the suit, which is charged with the liability to pay and satisfy the court-fees properly due and payable to the Crown.

In the event of the Crown being unable to effect a realization of the dues payable to the Crown on foot of the personal remedy afforded by the decree, whatever doubts may have existed prior to the decision of the case reported as *Ram Das v. Secretary of State* (1), as to the Crown's right to recover the court-fees due relying on their rights in rem as against the property recovered by the pauper in the original suit in an execution proceeding, without the necessity of instituting a separate suit, have been set at rest by the express provisions of R. 13, O. 33; which is a new rule, and one, I conceive, designedly enacted to bring the intention of the statute law into harmony with the law judicially declared by the decision of the Allahabad High Court reported as *Ram Das v. Secretary of State* (1). In our opinion R. 13, O. 33 expressly provides that all matters in controversy and in issue between any of the parties to a pauper suit, including the Crown, by virtue of their rights as a party concerning any question that may be debateable within the provisions of Rr. 10, 11 and 12 of that order, shall be determined in an execution proceeding before the Court executing the original decree and in no other way whatsoever. In law O. 33, R. 13, operates as a bar to the institution of an independent suit, whether by the Crown or by any other person. The wording of R. 13 is as follows:

"All matters arising between the Government and any party to the suit under R. 10, R. 11, or 12 shall be deemed to be questions arising bet-

ween the parties to the suit within the meaning of S. 47."

Now Government, seeking to enforce their claim to recover the court-fees due to them as against the property which has been recovered by the pauper in the suit originally instituted by him, is by virtue of this rule deemed and made a party to the original suit, and inasmuch as the point urged by the Crown is one directly arising within the provisions of R. 10, O. 33, it becomes a question as between the Government on the one hand and one other of the parties to the original suit, upon the other, which must be dealt with by an application to the Court executing the original decree under the provisions of S. 47 Civil P. C., Thus when we read R. 13, O. 33 in conjunction with S. 47, it amounts to this: that all questions arising between the parties to the suit in which an original decree is passed in respect of which the Crown is deemed to be a party referable to a matter under O. 33, R. 10, the same shall be determined by the Court executing the original decree, and not by a separate suit. The view taken by Mr. Mulla in his commentary on the Civil P. C., is that this rule operates as a bar to any independent suit. By that expression of opinion we are not in any sense bound; but it seems to us to be a correct interpretation of the principle of law controlling the rights of parties involved in this miscellaneous appeal.

The second contention put forward by Mr. Rajendra Prasad on behalf of the objector is, in our view, wholly unsustainable, viz., that the amount of court-fees is only a charge upon the property recovered so long as that property remains in the hands of the person against whom a personal order to pay has been made by the decree. There is no warrant or authority to support this argument; and certainly it is in the very teeth of the express phraseology of R. 10 itself. In our opinion the third argument addressed to us is in effect covered by our determination of the first. Consequently we are of opinion that the application made by the Crown to the Court executing the decree was a proper application duly and properly made; and that the Crown are entitled in that proceeding to have the property recovered by the pauper attached and made liable to satisfy the amount due to the Crown for

court-fees amounting to the sum of Rs. 540-8-0. We also think that the Crown had no alternative remedy save and except under S. 47, Civil P. C., and that no independent suit could have been instituted by the Crown to recover the amount which they now properly and legally claim. Accordingly we will dismiss this application in civil revision preferred by the objector-petitioner with costs measured at three gold mohurs.

Manuk, J.—To my mind O. 33, R. 13, is a complete answer to the appellant's first objection. Reading S. 47, with O. 33, R. 13, and omitting all words unnecessary for the purposes of this case, the statutory rule of law would run as follows:

"All matters arising between the Government and any party to the suit under R. 10, O. 33, shall be determined by the Court executing the decree and not by a separate suit."

The only question, then, would be whether the matter raised by Government fell under O. 33, R. 10. There being no doubt that in this particular case the matter raised does so fall, I agree in holding that the first contention of the appellant must fail. With regard to the second objection it is obvious that O. 33, R. 10, contemplates a successful pauper plaintiff recovering the property the subject-matter of his suit. *Prima facie* therefore the property would come into the possession of the plaintiff after the decree; and it would be unreasonable to hold that if the very contingency contemplated by the rule has happened, the property is no longer liable to a first charge in favour of Government. One result of accepting Mr. Rajendra Prasad's contention, in my opinion, would be that it would involve in all such cases a race between the Government and the successful plaintiff to execute their respective decrees against the defendant. On the other hand, if, as has happened in this case, the Government first seek and fail to recover their costs aliunde from the unsuccessful defendant, and meanwhile the plaintiff has obtained possession of the subject-matter of the suit, a further result would be that the final provision of O. 33, R. 10, would become a dead letter. Moreover, the rule does not make the charge conditional on the possession of the subject-matter of the suit by the unsuccessful defendant against whom in the first instance, as in

this case, the costs were granted. That, in my opinion, was never the intention of the legislature and, therefore, I agree that the appeal should be dismissed with costs.

V.S./R.K.

Appeal dismissed.

***A. I. R. 1919 Patna 102**

ATKINSON AND ROE, JJ.

Kameshwar Narain Singh—Defendant
—Appellant.

v.

Mt. Harbans Babui—Plaintiffs and Defendants—Respondents.

First Appeal No. 37 of 1917, Decided on 29th January 1919, from decision of Sub-Judge, Darbhanga.

***(a) Civil P. C. (1908), O. 21, R. 71—Auction purchaser making default in payment of deposit—Resale of property—Deficit in price—Person holding sale is to certify to Court fact of deficiency by certificate and Court is to execute it as if it were simple money decree—If sale was directed by Collector, under Public Demands Recovery Act, then person holding sale is to certify to him deficiency in sale and Collector is to execute that certificate as if it were money decree—Public Demands Recovery Act (1895), S. 8.**

The provisions of O. 21, R. 71, are applicable where default has been made by a purchaser in payment of the deposit required to be made by him in respect of property purchased by him at an auction sale, when that sale is held in execution of a civil Court's decree, or by the Collector in pursuance of the powers vested in him under an order or decree made by him in pursuance of the Public Demands Recovery Act. [P 104 C 2]

The true interpretation of R. 71, O. 21, Civil P. C., is that in cases in which a civil Court's decree is being executed, with regard to the sale of immovable property advertised for sale in the course of execution proceeding, connected with a civil Court's decree, and a deficiency occurs where a resale of the property becomes necessary by reason of a default contemplated by either R. 84 or R. 86, O. 21, Civil P. C., the person holding the sale is in that event to certify to the civil Court the fact of the deficiency by a certificate; and the Civil Court, whose decree was in the process of execution, takes cognizance of the certificate as to the deficiency and executes the same just as if it was an ordinary money-decree subject to the rules applicable thereto. If, on the other hand, the sale is one directed under and by virtue of the jurisdiction vested in the Collector and the Public Demands Recovery Act, then the person holding the sale certifies to the Collector the fact of a deficiency arising by reason of any default as aforesaid; thereupon the Collector is required in pursuance of the express words of R. 71, O. 21 to execute the certificate in the same manner as the civil Court would have done as if it were a money-decree. [P 105 C 1]

(b) Civil P. C. (1908), O. 21, R. 71—Remedy under, is not only remedy by which person damnified can recover damages.

Rule 71, O. 21, does not declare that the remedy conferred by its provisions is the only re-

remedy by which a person damnified in the manner indicated by the rule can recover damages.

[P 106 C 2]

***(c) Civil P. C. (1908), O. 21, R. 71—Person availing himself of remedy under R. 71 cannot afterwards resort to alternative remedy—But if remedy under that rule becomes nugatory judgment-debtor can pursue alternate remedy under Common law.**

If a person properly brings a proceeding under R. 71 and executes a certificate under that rule as a decree, then, having exercised his election, he deprives himself of the right of subsequently asserting whatever alternative remedy he may or might have at Common law. If however the remedy and procedure provided by R. 71 become inoperative and nugatory in effect and infructuous in result, owing to an error in procedure, then the judgment-debtor is entitled to pursue the alternative remedy which he has otherwise got under the Common law to recover damages for the wrong that has been done to him at the hands of the defendant; and more especially is this so when the certificate granted under R. 71 has become infructuous mainly by reason of the defendant's conduct.

[P 106 C 2]

(d) Civil P. C. (1908), O. 21, R. 71—Claim is not interest-bearing debt.

A claim and certificate issued under O. 21, R. 71, is not an interest-bearing debt. [P 107 C 2]

Rajendra Prasad—for Appellant.

Sudhansu Kumar Mitra—for Respondents.

Atkinson J.—This suit is brought by the plaintiffs to recover Rs. 16,000 by way of an alleged principal debt and for Rs 5,760 interest thereon. The plaintiffs are cosharers in Mahal Sorangpur. Plaintiff 1 is a proprietor to the extent of 14 annas odd and plaintiff 2, with others, are proprietors to the extent of about 1 3/4 annas. The suit is really in fact one to recover damages arising from loss and damage sustained by the plaintiffs owing to the deficiency of price bid by the defendants for the plaintiff's property between a first and subsequent sale thereof, which took place in pursuance of an order made by the Collector of Darbhanga under a demand recoverable under the Public Demands Recovery Act. It would appear that the property of the plaintiffs fell into arrears as to road-cess. The Collector, in pursuance of the powers vested in him, issued a certificate requiring the payment of the arrears, and by reason of the plaintiffs' default in paying such arrears the aforesaid property of the plaintiffs was legally brought to sale under the order of the Collector.

The sale was fixed to take place on 13th April 1912, and the first sale was actually held on 22nd April. At the sale held on 22nd April the defendants' bid

for the property offered for sale the sum of Rs. 26,000. In pursuance of the ordinary rules applicable to such sales the defendants were required to deposit in respect of their contract for the purchase of the property offered for sale (which was accepted) a sum in cash equivalent to 25 per cent. of the gross purchase money. The defendants were unable to pay in cash the full sum estimated at Rs. 4,500 as the amount of the deposit. The defendants, in discharge of their liability to pay the deposit, offered a cheque for Rs. 4,000 and a cash sum of Rs. 1,500. The Collector, or his deputy, who was conducting the sale, declined to accept a cheque in part payment of the deposit in the manner and form tendered by the defendants. It was consequently within the power of the Collector to declare the sale, which had been held on 22nd April, null and void by reason of the defendants' default in payment of the necessary deposit. This the Collector accordingly did, and notified that the property would be again offered for sale on the following day, the 23rd, at 12 o'clock. Having regard to the hour when the default took place by the purchasers on the 22nd, it would appear that the 23rd was the next available moment of time at which the property could have reasonably been resold; and so far as we can see, the Collector acted with promptness and due diligence under the circumstances in reselling the property; and that his conduct was in all respects a substantial compliance with the requirements of the Act as are in such cases provided.

On the 23rd the property was for a second time offered for sale; and was purchased by persons, other than the defendants, for a sum of Rs. 10,000. Thus the deficiency in price between the first sale at which the defendants bid and the second sale at which the property was actually sold to the subsequent purchasers thereof was the sum of Rs. 16,000. Thus under these circumstances this action has been brought by the plaintiffs to recover the sum of Rs. 16,000 plus interest thereon at the rate of 12 per cent. per annum. Five points have been taken in argument on appeal in this Court on behalf of the defendants against the decree passed by the learned Judge in this suit. The learned Judge by his decree awarded the plaintiffs the full sum of

principal or damages claimed, viz., Rupees 16,000, and interest thereon at the rate of 6 per cent. The appeal to us has been argued on behalf of the defendants by Mr. Rajendra Prasad; and the five points which he has taken are as follows: First, he contends that no independent suit is maintainable by the plaintiffs at Common law having regard to the provisions of O. 21, R. 71, Civil P. C., and that their remedy, if any, is limited by the statutory provisions of the abovementioned order and rule. Secondly, he contends that R. 71 does not apply at all to a resale of property which has been occasioned merely by default of a would-be purchaser in paying the required deposit.

Thirdly, he contends that the sale was irregular inasmuch as the sale at which the property was actually sold was more than seven days after the date first advertised and published as being the date of sale, viz., 13th April 1912. Fourthly, he contends that interest is not payable upon a debt or damages of the character sued for in this suit, and fifthly, he alleges that the plaintiffs are cosharers; and that the learned Judge has not by his decree apportioned the damages awarded between the respective cosharers proportionate to the interest to which the parties are respectively entitled and that the decree of the Subordinate Judge is erroneous in form. Really the main argument addressed to us turns upon whether this present suit is or is not maintainable. It is desirable however to dispose of the second argument: first; namely, that R. 71, O. 21 has no application to a case where a purchaser has merely made a default in payment of the amount of the deposit in respect of a sale of property of which he was declared the purchaser. Whatever doubt may have existed prior to the amendment of the previous Code of Civil Procedure no doubt now exists upon the point argued, because it is obviously clear that the present Civil Procedure Code makes the provisions of R. 71, O. 21, applicable in the case not only of a default by reason of a failure to pay the purchase money itself, but also in respect of a default in the payment of the required deposit. The conflict of authority, which originally prevailed between the views expressed in the Calcutta High Court and the Allahabad High Court respectively, is no longer now worthy of consideration as

declarations of the law governing the construction of what was formerly S. 293 of the old Code and now R. 71, O. 21 of the existing Code. Consequently we think that the provisions of R. 71 do apply where default has been made by a purchaser in payment of the deposit required to be made by him in respect of property purchased by him at an auction sale, when that sale is held in execution of a civil Court's decree, or by the Collector in pursuance of the powers vested in him under an order or decree made by him in pursuance of the Public Demands Recovery Act.

We will proceed to consider whether this suit is maintainable or not. R. 84, O. 21, Civil P. C., provides that if a purchaser makes default in the payment of the required deposit, the property shall be "forthwith resold." We think having regard to the circumstances under which, and the hour at which, the default was committed by the defendants, as purchasers, on 22nd April, that the same property which was offered for resale on the 23rd was resold "forthwith" within the meaning of R. 84, O. 21. That being so it becomes necessary to consider the true interpretation of R. 71 of O. 21. The plaintiffs' property was being sold, as already indicated, to satisfy a demand for arrears of road-cess at the instance of the Collector of Darbhanga. The plaintiffs claimed to be entitled to pursue the statutory remedy provided by R. 71, viz., to apply to the "person holding the sale" for a certificate certifying that a deficiency occasioning loss to them had taken place between the bidding on the first occasion when the property was offered for sale and the occasion on which the same property was subsequently sold. This the plaintiffs did; and after considerable delay they got a certificate from the officer of the Collector who held the sale dated 16th July 1914, certifying that the plaintiffs had sustained a loss between the price bid at the first sale, and the price bid and accepted at the second sale of Rs. 16,000. R. 71 requires that the deficiency so ascertained by the person holding the sale shall be certified "to the Court or to the Collector, as the case may be," so that the amount certified in such certificate may be recoverable under the provisions relating to the execution of decrees for the payment of money provided by the Civil Procedure Code.

In our opinion the true interpretation of this rule is that in cases in which a civil Court's decree is being executed, with regard to the sale of immovable property advertised for sale in the course of an execution proceeding, connected with a civil Court's decree and a deficiency occurs where a resale of the property becomes necessary by reason of a default contemplated by either R. 84 or R. 86, O. 21, Civil P. C., the person holding the sale is in that event to certify to the Civil Court the fact of the deficiency by a certificate; and the civil Court, whose decree was in the process of execution takes cognizance of the certificate as to the deficiency and executes the same just as if it was an ordinary money decree subject to the rules applicable thereto. If, on the other hand, the sale is one directed under and by virtue of the jurisdiction vested in the Collector under the Public Demands Recovery Act, then the person holding the sale certifies to the Collector the fact of a deficiency arising by reason of any default as aforesaid; thereupon the Collector is required, in pursuance of the express words of R. 71, O. 21, to execute the certificate in the same manner as the civil Court would have done as if it were a money decree. The execution of the certificate as a money decree is an express duty cast upon the Collector; and by virtue of S. 8, Public Demands Recovery Act, all the provisions of the Civil Procedure Code are made applicable to all proceedings within the scope of the Public Demands Recovery Act to enable the Collector, as such, to execute for the amount stated in the certificate as if the same was an ordinary money decree. We fail to appreciate any reason for doubt or uncertainty as to the rights, powers, and jurisdiction of the Collector to execute the certificate; just as if a similar certificate had been made and was returnable to the civil Court.

We consider that the certificate issued under O. 21, R. 71, has the force and effect of a decree; and it is by reason of this result and conclusion that the certificate can be executed as if it were an ordinary money decree. There is a uniform line of authority in the Calcutta High Court to support this interpretation of R. 71, O. 21. The plaintiffs ultimately got the certificate they applied for. Some little difficulty arose in the

Collectorate as to the method and manner of its execution. An application was made by the plaintiffs that the certificate should be executed by the Collector; and it would appear from the orders which have been printed at p. 50 of the paper-book, that some uncertainty existed in the opinion of the Board of Revenue as to whether the Collector had power himself to execute such a certificate as a decree. The plaintiffs applied for the certificate and the authorities were willing to give it, and eventually did give it; but, on an objection being taken by the defendants, it was urged, and urged successfully, that the revenue authorities represented by the Collector had no power to execute the certificate which was issued by the person holding the sale on their behalf; and accordingly on 9th July 1912, the Deputy Collector ordered that the deficit could not be realized by the Collector; and he directed the plaintiffs to seek their remedy for the execution of the certificate as if a money-decree in the civil Court. That order went on appeal before the Commissioner, Mr. Streatfeild; and Mr. Streatfeild was pleased to confirm the order of the Collector on 20th September 1912; and by his order he stated that the deficiency must be certified to the Collector and that

"the effect of such certificate is that of a money decree which the petitioner must proceed to execute through the civil Court."

Accordingly after that order was made by the Commissioner, a formal certificate, dated 16th July 1914, was issued to the plaintiffs certifying that they had sustained a loss on the original sale and subsequent re-sale to the extent of Rs. 16,000. From the order made by Mr. Streatfeild, as Commissioner, an appeal was presented to the Board of Revenue, and the Board of Revenue, then presided over by Mr. Maude, confirmed the opinion expressed by the Commissioner; and consequently no proceedings were ever taken in the Collectorate to realize or execute the order which was issued on 16th July 1914 and referred to in this case as Ex. 10, which is the certificate contemplated by R. 71, O. 21. In our opinion the orders of the Collector and Mr. Streatfeild, and the judgment of the Board, were all entirely wrong in so far as they decided that a certificate issued, in a case such as the present, under R. 71 which was in

effect a decree was incapable of execution by the Collector, but must of necessity be a decree executable by the civil Court. In our opinion the Collector was endowed with full authority and power to execute the certificate as a decree founded upon the express provisions of R. 71, O. 21, and upon him, and him alone, rested the imperative duty of executing the certificate of 16th July 1914 as if a money-decree; because S. 8, Public Demands Recovery Act, applies to all proceedings under that Act the rules of procedure contained in the Civil Procedure Code so far as the same may be applicable. Therefore by virtue of the incorporation of the Civil Procedure Code rules under S. 8, Public Demands Recovery Act, to all proceedings instituted under that Act, the Collector would have had power and authority to execute the certificate issued in the present case even so late as 16th July 1914.

The Collector, the Commissioner and the Board all acceded to the objection taken and urged by the defendants; whereby and as a consequence whereof the certificate granted to the plaintiffs under O. 21, R. 71, became wholly ineffectual and infructuous. Not one penny was realized on foot of the certificate that was granted; and in fact the Collector declined to execute it; and directed that the responsibility for executing this certificate as a decree should rest with the civil Court. The defendants' counsel argues before us that the view taken by the Collector and the Board of Revenue was right; and that in point of law it was the duty of the civil Court to execute the certificate that was issued by the person holding the sale in pursuance of R. 71, O. 21, Civil P. C. The argument addressed to us, we think, is wholly unsustainable; and no authority has been cited to support the proposition contended for. So far as the parties to this suit are concerned therefore the adjudication made by the revenue authorities, to which I have referred, merely amounts to a determination that as between the parties themselves the issue as to whether the order of 16th July 1914 was capable of being executed by the revenue authorities or by the civil Court is, as between them, a matter which may be said to be *res judicata*. The Collector and the Board were clearly wrong in law in the conclusion

at which they arrived as to the right and obligation of the Collector to execute the certificate as a decree; but a legal error of this sort on their part ought not and could not properly defeat the plaintiffs in the assertion of their right if they had a remedy independent of the privileges conferred upon them by R. 71, O. 21, to maintain an action at Common law to recover damages as against the defendants either for fraud or breach of contract. R. 71, O. 21 creates a right and confers a summary remedy for the enforcement of that right, which is merely an alternative to the plaintiffs' right at Common law to recover damages for a legal wrong done to them by the defendants and whereby loss ensues. In our opinion the same rule of law applies, whether the person damnified be a civil Court decree-holder or an original judgment-debtor whose property is about to be sold to satisfy a demand made by the Collector under the Public Demands Recovery Act.

Rule 71, O. 21 does not expressly itself declare that the remedy conferred by its provisions is the only remedy by which a person damnified, in the manner I have indicated, can recover damages. No doubt if a person properly brings a proceeding under R. 71 and executes a certificate under that rule as a decree, then having exercised his election he deprives himself of the right of subsequently asserting whatever alternative remedy he may or might have at Common law. Authority for this proposition will be found in the case of *Morell Brothers and Co. Ltd. v. Earl of Westmoreland* (1). If however the remedy and procedure provided by R. 71 become inoperative and nugatory in effect and infructuous in result owing to an error in procedure, then I fail to see why the plaintiffs are not entitled to pursue the alternative remedy, which they have otherwise got under the Common law, to recover damages for the wrong that has been done to them at the hands of the defendants; and more especially would this appear to be so when the certificate granted under R. 71 has become infructuous mainly by reason of the defendants' conduct in the Revenue Court.

Consequently we are of opinion that, having regard to the order of the Commissioner, dated 20th September 1912,

(1) [1904] A. C. 11.

coupled with the order of the Board of Revenue, dated 27th January 1915, the certificate, Ex. 10, became inoperative and nugatory in its effect without any fault or default on the plaintiffs' part; and that by reason of these orders the plaintiffs must be deemed to be relegated back to their original position and in consequence be entitled to maintain the present suit for damages under the Common law.

It becomes unnecessary to decide or discuss the various arguments that have been addressed to us arising from the conflict of authority prevailing in the High Courts of Calcutta and Allahabad respectively with reference to the true interpretation of O. 21, R. 71, further than to say that in our opinion the certificate contemplated by R. 71 when issued is, in its operation and effect, a decree; and we feel that in so deciding we are bound by the principle of *cursus curiae* laid down by a long line of uniform authority in Calcutta dating as far back as 1865 and continuing to the present time, commencing with the case reported as *Baboo Sooruj Buksh Singh v. Sree Kishen Doss* (2) and adopted in the next following cases reported as *Sooruj Buksh Singh v. Sreekishen Doss* (3), *Bajinath Sahai v. Moheep Narain Singh* (4), *Pali Kishore Deb Sarkar v. Guru Prosad Sukul* (5) and *Amir Baksha Sahib v. Venkatachala Mudali* (6). The only case which is opposed to the conclusion at which we have arrived is the case reported as *Deokinandan Rai v. Tapesri Lal* (7). If the point for decision were one of first impression, a great deal of weight would naturally and rightly be attached to the authority of the Full Bench ruling reported as *Deokinandan Roy v. Tapesri Lal* (7). But so far as this Court is concerned, we feel that the practice that has been laid down has been acted upon uniformly as the rule of law which governs the interpretation of R. 71, O. 21 and that by the rulings of the Calcutta High Court we are coerced to abide. Consequently we are of opinion that the decision of the learned Judge was right in so far as he gave a decree

as against the defendants for the sum of Rs. 16,000.

With reference to the interest allowed by the learned Subordinate Judge, we think that the learned Judge was wrong in point of law in the conclusion at which he arrived. It has been decided that a claim and certificate issued under R. 71, O. 21 is not an interest-bearing debt: *Sooraj Bakhsh Singh v. Srikishen Das* (3). Can the plaintiffs in the present suit, which is not a proceeding under R. 71, O. 21, Civil P. C. but an action at Common law against the defendants for damages, be declared entitled to interest in respect of the damages they claim? To support this contention reliance has been placed on the Interest Act of 1839. From a perusal of the Interest Act it would appear that that Act only applies to debts certain or sums of money specified to be paid on certain date, or otherwise in a definite time. But the Act does not apply to cases which merely sound in damages only, even though the damage claimed may be capable of definite ascertainment in money value. Accordingly we think that the provisions of the Interest Act do not apply to support a claim such as the present; and in our opinion the learned Judge was wrong in awarding by his decree interest even at 6 per cent, as against the defendants.

Accordingly we vary the decision of the learned Judge and declare that the sum of Rs. 16,000 was properly decreed as against the defendants and we set aside so much of the judgment as awards the defendants Rs. 2,880 as and for interest; and we direct that the defendants do pay the costs of plaintiff 2 of this appeal measured at five gold mohurs by consent, and costs in the Subordinate Court proportionate to his demand as a cosharer. Plaintiff 1 owing to her non-appearance in this appeal will receive no costs in this Court, but will receive costs in the subordinate Court proportionate to her demand as a cosharer.

This decision will not affect the rights of the parties with whom the defendants have already entered into terms of compromise and will therefore only apply to plaintiffs 1 and 2. The defendants will be entitled to deduct from the sum awarded by the decree as pronounced in this Court, whatever sum they have already paid to the cosharers

(2) [1866] 6 W. R. Mis. 126.

(3) [1868] 9 W. R. 500.

(4) [1889] 16 Cal. 535.

(5) [1898] 25 Cal. 99.

(6) [1895] 18 Mad. 439.

(7) [1892] 14 All. 201.

other than plaintiffs 1 and 2, and the decree shall only be executed for whatever balance may be then due.

It may be observed that this decision really is of no value as an authority to help in future cases, because the matters in dispute in this appeal have been settled by fresh legislation applicable now in this province under Act 4 of 1914 known as the Bihar and Orissa Public Demands Act.

Roe, J.—I agree.

V.S./R.K.

Decree varied.

A. I. R. 1919 Patna 108

ATKINSON AND MANUK, JJ.

Ganga Singh—Defendant—Appellant.
v.

The Chairman, Dist. Board, Patna and others—Plaintiffs and Defendants 2 and 3—Respondents.

Appeal No. 976 of 1917, Decided on 10th February 1919, from appellate decree of Sub.-Judge, Patna, D/ 13th July 1917.

(a) **Bengal Tenancy Act (1885), Ss. 21 and 182—Settled raiyat acquiring land for homestead—He acquires occupancy rights in such land even though it may be held under different landlord.**

Sections 21 and 182, Ben. Ten. Act, should be given wide and very liberal construction. If a settled raiyat of lands in a village acquires other land as a raiyat, apart from the lands of which he is a settled raiyat, for the purpose of creating a homestead thereon, then under the joint operation of Ss. 21 and 182 he acquires occupancy rights in such lands, even though the lands so acquired for the purpose of a homestead be not held under the same landlord as the lands in respect of which such tenant is a settled raiyat. [P 110 C 1]

(b) **Landlord and Tenant—Yearly tenure at yearly rent—No term fixed for service of notice to quit—At least six months time must be allowed.**

Where no specified term is fixed for the service of a notice to quit, the principles of English law apply and at least a six months' notice must be given to determine a tenancy where the contract between the parties is a contract based upon a yearly tenure at a yearly rent. [P 111 C 1]

A. K. Ray—for Appellant.

Kulwant Sahay—for Respondents.

Judgment.—This second appeal comes before us from the decision of the Second Subordinate Judge of Patna, dated 13th July 1917. The suit was instituted by the Chairman of the District Board of Patna against the defendant, who is a minor, to recover possession of three khata two dhurs of land situated in the Mauzah Nohta, on the Futwa Road.

It would appear that the defendant's

father obtained from the District Board two plots of land in the Mauza of Nohta for the purpose of a homestead and erecting thereon a dwelling house. The first plot containing one khata 2 dhurs was leased by the District Board to Pharangi Singh, father of defendant 1, under an indenture of lease, dated 9th November 1896; the rent reserved was Re. 1-2-0 per annum; and the rent so reserved was to be paid annually on 31st March in each year. The second parcel of land containing 2 khata was demised to Pharangi Singh by the District Board under an indenture of lease, dated 27th January 1898, the rent reserved being Re. 1-8-0 per annum; the reserved rent was payable annually on 31st March in each year. The aforesaid leases contained no stipulation with regard to the time of the duration of the demise. The leases merely embodied a term providing that upon notice being given by the District Engineer on behalf of the District Board, the lessee or his representative for the time being would vacate possession of the demised premises and hand over possession of the same to the District Board; but the period of time with respect to the term of the notice required to be given for the termination of the respective leases was not specified. It is not denied that Pharangi Singh, the father of the defendant, did in fact build a pucca house upon the three khata two dhurs of land demised by the above-mentioned leases at considerable cost, and that these premises in fact constituted his homestead. It is sought now in this suit to recover possession of the demised premises; and to compel the defendant at his own cost to remove the pucca house erected thereon. The terms of the respective leases are somewhat unusual and apparently harsh in their provisions.

On 15th June 1914 notice to quit was served by the District Engineer on behalf of the plaintiffs upon defendant 1, requiring him to vacate possession of demised premises within one month from the date of the serving of notice. It is alleged that on 14th July 1914, the mother of the defendant applied to the District Board to allow her son and herself to remain in possession of the demised premises during the rainy season of the year 1914. This request, it is alleged, the District Board agreed and on 1st February 1915 the District Engineer

on behalf of the plaintiff applied by letter to the defendant requiring him to vacate the premises forthwith; but no fresh notice to quit in accordance with the provisions of both leases was served on 1st February 1915 or at any time subsequent to 14th July 1914, when the Board consented to allow the defendant and his mother to remain on in possession. The defendant failed to deliver possession in accordance with the terms of the request contained in the aforesaid letter of the District Engineer whereupon the plaintiffs instituted the suit on 6th April 1916.

The learned Munsif dismissed the suit, holding that no notice to quit had been served upon the defendants in accordance with the requirements of the lease; and that accordingly no demand had been made to justify the plaintiffs' claim to recover possession of the demised premises in a suit framed for ejectment. On first appeal to the Second Subordinate Judge of Patna, the learned Subordinate Judge reversed the decision of the Munsif and held that the suit was maintainable; that the notice required by the leases to be served had been served; and that the plaintiffs were entitled to possession of the demised premises; and accordingly he gave a decree in accordance with the terms of the plaintiffs' claim. From the decision of the learned Subordinate Judge this second appeal has been preferred to this Court. For the purpose of resisting the plaintiffs' claim in this suit Mr. Ray on behalf of the defendant has urged four separate contentions; and they may be summarized as follows: (1) That the defendant by virtue of S. 182, Ben. Ten. Act, has acquired occupancy rights in the two plots of land demised by the respective leases of November 1896 and June 1898; and that consequently he is not liable under these circumstances to be ejected therefrom by virtue of the proceedings in this suit, notwithstanding the provisions expressly contained in the aforesaid leases. (2) That the notice in fact served by the District Engineer on behalf of the plaintiffs on 15th June 1914, demanding that the defendant should vacate and surrender possession of the demised premises within a month therefrom, was a notice which was invalid in point of law; the tenancy being in the nature of a yearly tenancy; subject to the payment of the

yearly rent. (3) Mr. Ray contends that upon the evidence the learned Judge was wrong in holding that there was "good and real service" of the notice to quit, and (4) it is contended there was no reply given to the notice served, nor was any request made by the mother of the defendant for permission to remain in occupation of the demised premises during the rains of 1914, as alleged by the plaintiffs, and that consequently the notice to quit, if served, was in law waived. On the four arguments addressed to us the first two involve questions of pure law; and if either of these first two arguments be well founded, then it becomes immaterial to consider the mixed questions of law and fact involved in the 3rd and 4th arguments put forward by Mr. Ray on behalf of the defendant.

Before dealing with the first argument presented for our consideration it is right to mention a matter that is not in dispute that the defendant (and his father before him) were settled raiyats in respect of other lands in the village of Nohta, apart and distinct from the lands in suit. This fact is not really in controversy; nor do we see how it well could be, having regard to the documents in the case which clearly show that at the time the premises in suit were demised the defendant's father was in possession of other lands in the village of Nohta as a raiyat; and that the lands which formed the subject-matter of the demise were merely acquired for the purpose of creating a homestead adjoining the raiyati lands of which the defendant's father at the time was the possessor; and which raiyati lands were held under a different landlord to the lands in suit. Therefore it is contended that, inasmuch as the plaintiff is a settled raiyat of other lands within the village of Nohta, the demised premises, being merely homestead lands, are, in the absence of local custom and usage to the contrary, controlled as to their tenure, rights and incidents by the provisions of the Bengal Tenancy Act; and that the defendant by virtue of the conjoint effect of Ss. 21 and 182 has acquired occupancy rights therein.

This point was taken in both the lower Courts, but it does not seem to have received the consideration which it deserved; and it is hard to follow the reasoning of the learned Munsif and the learned Subordinate Judge in dismissing

this argument as unworthy of consideration. S. 21, Ben. Ten. Act, provides "that every person who is a settled raiyat of a village within the meaning of the foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village."

And S. 182 provides that "when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat."

Beyond all controversy the defendant and his predecessor-in-title held the demised premises as raiyats and apart from the other lands in the same village in respect of which they were settled raiyats. The uniform current of authority in the High Court of Calcutta from the year 1893 down to 1915, and up to the present time, has been in favour of giving Ss. 21 and 182, Ben. Ten. Act, a wide and very liberal construction; and from the positive judicial decisions which have been pronounced, during the period mentioned, a clear rule of law is deducible, which decides that if a settled raiyat of lands in a village acquires other land as a raiyat, apart from the lands of which he is a settled raiyat, for the purpose of creating a homestead thereon, then he acquires occupancy rights in such lands even though the lands so acquired for the purpose of a homestead be not held under the same landlord as the lands in respect of which such tenant is a settled raiyat. Indeed in two cases, viz., the cases reported as *Kripa Nath Chakravarti v. Sheikh Anu* (1) and *Harihar Chattopadhyaya v. Dinu Bera* (2), the High Court of Calcutta have gone so far as to lay down that if a raiyat is a settled raiyat of one village under one landlord, and he acquires lands for the purpose of a homestead under a different landlord in a different village, that nevertheless by the operation of Ss. 21 and 182, Ben. Ten. Act, he has occupancy rights in the lands so acquired by him for the purposes of a homestead. This decision is very far reaching and may under suitable conditions require further judicial consideration in this province.

The authorities cited in support of the argument addressed to us on behalf of the defendant are reported as *Kripa Nath Chakravarti v. Sheikh Anu* (1),

Golam Mowla v. Abdool Sawar Mondal (3), *Harihar Chattopadhyaya v. Dinu Bera* (2), *Bhikariram Bhagat v. Maharaj Bahadur Singh* (4), *Iswar Chandra Dey v. Murari Lal Dutt* (5) and *Dina Nath Nag v. Sashi Mohan Dey Tarafdar* (6).

In the case reported as *Bhikariram Bhagat v. Maharaj Bahadur Singh* (4) the current of all the prior decisions is carefully reviewed in the judgment of the learned Judges that decided that case, and there is little room for doubt that the law is now perfectly well settled and that by the *cursus curiae* of judicial authority, laid down by the Calcutta High Court, we in this Court feel ourselves bound in cases where the facts are in *pari materia* with such current of authority, and more especially so in interpreting and construing an Act such as the Bengal Tenancy Act which applies to Bengal as well as to the Province of Behar, and formerly within the jurisdiction of the Calcutta High Court. Therefore in our opinion, on the undisputed facts of this case notwithstanding the express terms and provisions of the respective leases of 9th November 1896 and 27th June 1898, the defendant has acquired in law, under the joint operations of Ss. 21 and 182 of the Ben. Ten. Act, occupancy rights in the 3 kattas 2 dhurs of land demised and which were acquired for the purposes of a homestead in the village of Nohta on the Futwa road, and that consequently he cannot be ejected therefrom under the provisions contained in either of the leases aforesaid. In so far as the learned Munsif and the Subordinate Judge may have thought that the express provisions of the leases overrode the respective sections of the Ben. Ten. Act referred to, they were in error; because in our opinion the provisions of the leases were and are rendered nugatory and void by virtue of S. 178, sub-S. 3, Cl. A, of that Act, and no other conclusion is possible, founded on the ratio decidendi of the cases already cited, and in which this principle is clearly recognized. With regard to the argument as to the validity in point of law of the notice to quit, speaking for myself, I am of opinion that the argument addressed to us on behalf of the defendant is well founded.

(3) [1911] 9 I. C. 922.

(4) [1916] 43 Cal. 195=34 I. C. 152.

(5) [1917] 41 I. C. 472.

(6) [1915] 31 I. C. 16.

(1) [1906] 4 C. L. J. 332.

(2) [1911] 10 I. C. 139.

The tenancy or interest created by the leases, whatever it may have been, was in a sense at least a yearly one, to enure year by year until notice to quit was served determining the tenancy the rent that was payable, was payable yearly; and the contract made between the parties clearly contemplated a yearly liability for the discharge of the rent payable and to become due under the leases respectively.

In such cases the High Courts of India have held that the principles of English law apply where no specified term is fixed for the service of a notice to quit; and that inasmuch as the English law, founded upon the good sense of the Common law, requires that where no time is specified within which a notice to quit must be served, the law implies that at least a six months' notice must be given to determine a tenancy where the contract between the parties is a contract based upon a yearly tenure at a yearly rent. In the present case therefore the notice to be a valid notice should have been served upon the defendant requiring him to deliver up possession of the demised premises within six months from the date of service of such notice. A month's notice was in fact admittedly only given; and in our opinion this notice was in sufficient in law to operate as a due and proper demand of possession to determine the interest of the lessees in the demised premises under the terms of the above mentioned respective leases. The authorities in support of this contention are numerous and the law is well settled; and we apply the principles of English law to the facts of the present case. The cases cited will be found reported as *Kishori Mohun Roy Chowdhry v. Nandkumar Ghosal* (7), *Ismail Khan Mahomed v. Jaigun Bibi* (8), and *Hemangini Chowdhry v. Srigobinda Chowdhury* (9).

Having decided these two points in favour of the defendant, it becomes unnecessary to consider the other two arguments presented to us on his behalf. We consequently are of opinion that the decision of the lower appellate Court was wrong in law and that the decree of the learned Subordinate Judge must be set aside and the decree of the Munsif

dismissing the suit be restored for different reasons. The plaintiff will pay to the defendants their costs in all Courts.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 111

MULLICK AND MANUK, JJ.

Satrughan Patar and others—Appellants.

v.

Emperor—Opposite Party.

Death Ref. Case No. 1 of 1919, and Criminal Appeals Nos. 6 and 15, Decided on 24th January 1919, from a decision of Sess. Judge, Manbhum.

(a) Penal Code (1860), S. 34—Presumption of constructive intention should not be pushed too far—It is only when Court can with judicial certitude hold that accused must have preconceived result that ensued that S. 34 can be applied.

The presumption of constructive intention must not be too readily applied or pushed too far. The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under S. 34, I. P. C.; the former by itself is irrelevant to the section. It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that S. 34 may be applied. [P 119 C 2]

(b) Criminal Trial — Question of motive should be considered only upon facts established—Judge should not import his personal knowledge.

The question of motive for the commission of a crime should be considered only upon the facts established in the evidence in the case and the Judge should not import his personal knowledge of the state of the district or of the character of the accused into the case. Observations relating to such matters are irrelevant. [P 115 C 2]

H. L. Nandkeolyar—for Appellants.

Govt. Advocate—for the Crown.

Mullick, J.—In these two appeals three persons, named Labhu Patar, Satrughan Patar and Sripati Patar, have been sentenced by the Sessions Judge of Manbhum as follows: Labhu Patar and Satrughan Patar to death, and Sripati to transportation for life, for having on 2nd August 1918 committed murder by causing the death of Upendra Mahato Digwar. The case for the prosecution is that on the night of 24th July 1918 three dacoities took place in the village of Seadih, of which the appellants are residents. Suspicion pointed to the appellants, who belong to the Bhumij caste; and on the date of the alleged murder the Sub-Inspector of Gourangdin Thana had

(7) [1897] 24 Cal. 720.

(8) [1900] 27 Cal. 570.

(9) [1902] 29 Cal. 203.

gone at about 7 a. m., to the village for the purpose of conducting an investigation and had directed Upendra Mahato who held the office of Digwar, or village watchman, to join him in the village for the purpose of assisting in the investigation. At about 10 or 11 a. m., Upendra Mahto, accompanied by Netai Das, Roshan Baur Chowkidar, Indra Layek Tabedar and Akhoy Tabedar (the last two being some subordinate officers) had just crossed a river near Seadih and was going along a small path, when the appellants Labhu and Sripati suddenly jumped up from a place where they were in hiding and attacked him; the former with a sword, and the latter with a dagger. Upendra Mahato was armed with a swordstick, and in defending himself is alleged to have caused a slight injury to Labhu, but he received no assistance from his companions and was felled to the ground. Thereupon his assailants ran away towards the village.

It is alleged that Roshan and Indra were then sent off to bring assistance while Netai and Akhoy remained with the wounded man. It is not certain what were the precise injuries from which he was then suffering, but it is clear that he was able to speak and was assisted to a tree some 60 or 70 cubits distant. About half an hour later while he was lying there, Labhu and Sripati accompanied by their uncle Satrughan came from the village and again attacked him. Labhu according to the majority of the witnesses, was armed with a sword, Sripati with a dagger, and Satrughan with an axe. They fell upon the wounded man and hacked him to death. It is further alleged that Satrughan also struck him with a big stone. Information was given to the Sub-Inspector of Police at Gourangdin Thana at 4 p. m. The place of occurrence being only three miles off, the delay in lodging the information has been one of the points made by the learned counsel for the appellants. The Sub-Inspector arrested Satrughan in the village that same night and it is alleged that Satrughan thereupon handed him an axe. Labhu and Sripati surrendered later, and denied having taken any part in the attack. On the other hand Satrughan has from the outset taken the whole blame upon himself and has set up the case that owing to enmity with the deceased he attacked

the deceased when he was going along the road above mentioned and killed him single handed.

The learned Sessions Judge declined to believe this story and agreeing with both the assessors has accepted the case for the prosecution that the deceased was attacked in the manner alleged by the witnesses at the Sessions trial. The learned counsel who has appeared for the appellants has taken us through the whole of the evidence and has urged everything that it was possible to urge on their behalf. But having carefully considered the arguments addressed to us I think that the conviction of Labhu and Sripati is substantially correct. With regard to Satrughan the case is different and I will proceed first of all to consider the evidence against him. This appellant is according to his statement at one place, 58 years old, and his statement at another place, 62 years old. The other two appellants Labhu and Sripati are 32 and 21 years of age respectively.

The learned Sessions Judge finds that Satrughan took a leading part in the attack upon the deceased after his two nephews had gone to the village and informed him of the first assault. It is curious however that the first information fails to support the case made out by the prosecution witnesses as to the manner in which Satrughan was armed. In the first information report it is only stated that Satrughan took up a stone and threw it at Upendra Mahto. In the Court of the Committing Magistrate and the Sessions Judge, the witnesses were not cross-examined as to why no mention was made in the first information of the fact that Satrughan was armed with any sharp cutting weapon. Netai's statement before the Committing Magistrate was that Satrughan was armed with an axe; in the Sessions Court he varied that statement by saying that he was armed with a kudali. Akhoy Tabedar in the Sessions Court said that he was armed with an axe and a stone. Mangal's story was to the same effect. Indra Tabedar and Roshan Chowkidar who were sent off to fetch assistance after the first attack, of course, are unable to state how Satrughan was armed, because they did not return to the spot till after the deceased had been killed. The discrepancies as to the manner in which Satrughan was armed appear to me to be very

serious. I attach great importance to the first information on this point and I fail to see why, if Satrughan was armed with a cutting instrument, no mention of it should have been made in that document. It is much more probable that after the deceased had been killed, he, as a parting blow, picked up a stone and hurled it at the body of the deceased.

The eyewitnesses to the occurrence so far as he is concerned are Netai, Akhoy and Mangal, but as I have said, although they are positive that Satrughan was armed with a deadly weapon, I think it would be safer to hold that he did not commit any act in furtherance of the common intention of his two nephews. It has been strongly pressed on us by the learned Government Advocate that even if Satrughan took no part in the assault and even if he merely threw a stone at the deceased, whether before or after the death of the deceased, his mere presence at the assault would render him liable, by the application of S. 34, I.P.C. to conviction for the offence of the murder. It is contended that he shared the common intention to kill the deceased, and he is liable in the same manner as his two other companions. Now this question of intention is a question of fact. I can find no evidence that warrants the inference that he came from the village intending to kill Upendra Mahto Digwar or that he assisted them in any way to accomplish their object. If the evidence as to the axe is disbelieved, then there is also no evidence that he joined in inflicting any of the injuries from which the deceased died. The evidence is equally consistent with the theory that he intended merely to cause hurt, and that after the deceased had been killed by the two young men, he took up a stone and hurled it upon the body of the deceased. In this view of the case it is impossible to apply S. 34, I. P. C., and therefore Satrughan must be acquitted of the offence of murder of which he has been convicted.

The conviction and sentence, so far as Satrughan Patar is concerned, must be set aside, and he must be acquitted and set at liberty. There remains the case of the two other appellants, Labhu Patar and Sripati Patar. If it is once held that Satrughan was not armed in the manner alleged, then the case becomes very much

simpler. Holding as I do that Satrughan was not armed with any deadly weapon, and that he only struck the deceased with a stone, it is clear that if the appellants Labhu and Sripati did at all attack the deceased then they and they alone must be responsible for his death. Now the medical evidence shows that the deceased received no less than nine incised wounds. Of these the first was an incised gaping wound 8 inches into 4 inches from the middle part of the back of neck transversely to the angle of mouth on the left side, cutting the soft structures, vertebral column with the spinal cord and the left side of the lower jaw, also the big vessels and nerves on the left side. The second wound was an incised wound 7 inches into 3½ inches encircling the whole of back and upper part of left side of the neck cutting all the structures and exposing the mouth cavity. The third was an incised wound 8 inches into 2½ inches into ½ inch situated obliquely on the lower part of the left side of back of the neck and extending downward to the right shoulder blade. The others were incised wounds on the right shoulder, the back of the head, and the top of the head and on the left thumb and index fingers.

It is necessary therefore to determine whether Labhu and Sripati inflicted all or any of the above injuries. The first question that arises in this connexion is whether Labhu was armed with a sword as alleged by the majority of the witnesses. The first information mentions a sword; so also do Netai, Akhoy, Indra and Roshan in their depositions before the Sessions Judge. The only noticeable contradiction is that of Netai in the Sessions Court with reference to the second attack, where he says that Labhu came back with an axe. Before the committing Magistrate he said that Labhu came back with a sword. After making the fullest allowance for this discrepancy I think there is a preponderance of evidence that Labhu was armed with a sword and not an axe in both assaults. Then as to Sripati, the first information states that he was armed with a dagger. Netai and Akhoy in the Sessions Court corroborate this story.

Mangal who was in both the first and the second attacks states that the two young men were cutting the Digwar. He does not specify with what particular weapon

each was armed. Indra makes a noticeable contradiction. He only witnessed the first attack and he states that Sripati was armed with an axe. This is not supported by any other witnesses, while Roshan Chowkidar merely states that Labhu and Sripati wounded the Digwar. In my opinion, after making allowance for the contradiction in the evidence of Indra, we ought to accept the version of Netai as given in the first information and corroborated in Court by Akhoy. These two witnesses had no particular object in implicating the appellant Sripati falsely and it is certain that they stayed with the deceased from the first to last, and I accept the contention of the learned Government Advocate that Sripati was armed with a dagger and that he joined in the attack upon the deceased with this weapon. The next question is, What were the injuries caused by Labhu and Sripati respectively. It is impossible from the evidence to form any correct idea of the precise injuries that were caused in the first attack. The first information states that Labhu struck the deceased with a sword on the back of the head and on the hand; in defending himself the deceased's thumb and finger were cut and the deceased was felled to the ground after he had struck Labhu with his swordstick. After the deceased fell, Netai used his lathi and struck Labhu on the head.

With regard to Sripati there is no mention in the first information of the particular injuries caused by him. In Court Netai's story is that Labhu cut the deceased on the left shoulder with a sword, and Sripati struck him on the back with a dagger. When Labhu aimed a second blow with the sword, the deceased held up his hand and received the injury on his thumb. Sripati then cut him on the head.

Akhoy Tabedar states that Labhu struck the deceased on the left side with a sword and Sripati struck him on the back with his chura, then Labhu struck the deceased on the hand and Sripati struck him again with a dagger. Mangal does not give any details. Indra makes a noticeable contradiction by saying that Labhu struck the deceased on the neck, and that Sripati struck him on the hand. It is clear that this is a version which has not been given by any other witness.

Roshan merely states that Labhu at-

tacked the deceased with a sword and that Labhu and Sripati together wounded him. In this state of the evidence it is not possible to state with any degree of accuracy how many injuries were caused in the first attack; but it does appear from the medical evidence that of the injuries found by the medical officer wound No. 3 was probably caused in the first attack by Labhu and it was the injury on the left shoulder which was first of all inflicted with a sword. It is not clear why the witnesses should not have been in a position to detail the precise injuries which were caused in the attack, but the evidence points to the fact that the injuries which killed the deceased were caused after the two appellants Labhu and Sripati returned from Seadih with Satrughan. The evidence is conclusive upon the point that in the first attack the deceased did not receive any serious injury to the neck, but that as a result of the second attack his head was almost severed from the body and I have no doubt that injuries Nos. 1 and 2 were caused in the second attack and they were by themselves quite sufficient to cause death.

On this point the only witnesses whose testimony is available are Netai, Akhoy and Mangal; they all agree in stating that the appellants hacked the deceased to death. They do not go into detail, nor from the number and nature of the injuries caused would it be possible to expect them to do so. The medical evidence shows that each of these major injuries might have been caused by one or more blows by a sharp cutting instrument. It is quite clear that there was a savage and violent attack with the sword and the dagger, and that some of the injuries were certainly caused by more than one single blow. There can be no question from the nature of the attack that the intention of the assailants was to cause death.

In these circumstances I have no doubt that the assessors were right in finding that Labhu and Sripati were guilty of murder. One assessor did, but the other did not believe the whole of the evidence, but both were satisfied as to the guilt of the assailants. In my opinion the evidence is on the whole substantially true and the eyewitnesses were at the place of occurrence at the time when the murder took place. It has been urged in this

connexion that there was no adequate motive for the crime. The learned Sessions Judge has gone into this matter in some detail. He has shown that the deceased Digwar succeeded a Bhumij in the office of Digwar some 14 years ago, and that since then he has been assessing the Bhumij inhabitants of Seadih with rent for lands which they had previously held rent free. It also appears that in April 1918 the son of the deceased brought an assault case against Sripati and Labhu which was compromised on the payment of Rs. 15. It is also established by the evidence of the Sub-Inspector that in connexion with the three dacoities which occurred on 24th July, only nine days before the murder, the deceased had told the police that he suspected the three appellants. Clearly there was sufficient motive for the appellants to join in an attack upon the deceased.

It is next urged that Netai was assisting the police in the matter of the dacoities and that the eyewitness Mangal is the servant of the men in whose house one of the dacoities took place. It has also been pointed out that Indra and Akhoy are themselves village police officers. Making the fullest allowance for these facts I am unable to see why the evidence given by these witnesses should be rejected as untrue. One if not both assessors believed them. He had an opportunity of watching their demeanour and I think he was right in coming to the conclusion that they had substantially spoken the truth.

It has been on the other hand contended that Satrughan's statement, to the effect that the deceased had outraged his daughter and daughter-in-law and had in many other ways attempted to molest the residents of Seadih, is true. Now there is not an atom of evidence to support this contention and the bare statement of Satrughan cannot be accepted. The appellants before us apparently had legal assistance in the Court below, and if there was any substance in the allegation that the deceased had been guilty of molesting the women of Satrughan's household, we should have expected some evidence to have been called. In the absence of such evidence I must hold that the allegations have not been made out. The learned Counsel has attempted to use Satrughan's statement for the purpose of mitigating the guilt of Labhu and

Sripati, but no grave and sudden provocation having been established, I can find no materials for reducing the offence to one under S. 304, I. P. C. With regard to the question of motive I have to observe that the learned Sessions Judge has made certain observations in this connexion which are irrelevant. He has used his own knowledge of the state of the district for the purpose of showing that a Bhumij is a habitual criminal and that he is not deterred by considerations of safety or prudence from committing murder in open daylight. In my opinion these observations were irrelevant, and the question of motive should have been considered only upon the facts established in the evidence in the case.

The learned counsel for the appellants has drawn our attention to the delay that occurred in lodging the first information. The offence is alleged to have been committed between the hours of 10 and 11 A. M. and Netai Das, although he had only three or four miles to go, did not arrive at the Police station till 4 P. M. It is suggested that the interval was taken up in concocting a false story. Allowance must be made for the fact that the attack was brutal and violent. It was necessary for Netai to obtain advice and his nerves after witnessing a scene of that kind must have been considerably shaken; in my opinion the interval of four hours under the circumstances does not necessarily indicate that the story eventually placed before the police was a concocted and false story. There could be no object in concocting such a story if Satrughan was the real murderer, and Labhu and Sripati were not there at all. In particular I fail to see how Netai could have known of the injury inflicted by the deceased with his sword stick on Labhu's side. The medical evidence also shows that there were two other slight injuries upon Labhu's body, and the suggestion that Netai caused these with a stick seems to me to be well founded.

It has been urged that it is strange that Netai, instead of going to Seadih where the Sub-Inspector was waiting, should have gone by a roundabout way to Gaurangdih Thana. Now we have no evidence that at the time that the murder took place the Sub-Inspector was actually in the village. He states in his evidence that he left the village at about 11 A. M. and in the absence of any defi-

nite information that he was in the village, we cannot say that Netai was wrong in going off towards the thana and avoiding the inhabited parts of Seadih where the Bhumijes were so hostile. In these circumstances the action of Netai does not seem to me to indicate that there was any bad faith on his part. On a review of the whole evidence I am satisfied that the conviction of Labhu and Sripati must be affirmed. There can be no question that from the nature of the weapons used and the injuries inflicted the offence must be one of murder under S. 302, I. P. C. The sentence of death passed upon Labhu in my opinion is appropriate. It is impossible to hold that there were any mitigating circumstances in his case. He is 32 years of age, and fully aware of the nature and consequence of his act. The learned Sessions Judge has considered it necessary to make a difference in the case of Sripati on the ground of his youth. I will accept the view taken by him, and hold that perhaps there were circumstances in his case to show that he was merely obeying the orders of the two older men.

The result is that the appeals will be dismissed and the sentence of death passed upon Labhu will be confirmed and so also the sentence of transportation for life passed upon Sripati.

Manuk, J.—Although I agree with the judgment just delivered and the order proposed to be passed by my learned brother, having regard to the gravity of the issues involved in this case I deem it desirable to express my own views separately. The story of the crime as told in Court by the principal eyewitness, one Netai Das, a cultivator and Baishudi of village Ketun Kiyari, is as follows:

He was going at about 10-30 on the morning of the 17th Sraban, corresponding to 2nd August 1918, to village Seadih, which appears from the map to be about a mile west of village Ketun Kiyari. He says he was going to buy goor, but it is more than probable, as observed by the learned Sessions Judge, that he was really going to assist in the inquiry regarding the dacoities that had taken place in Seadih. On his way not far from his house he met the deceased Digwar with Akhoy Degharia Tabedar, P. W. 2, a resident of Tala Jura, Roshan Bouri, chaukidar, P. W. 4, and Indra, also a tabedar of Ketun Kiyari, P. W. 3. As the party

crossed the river and proceeded up the gulli, the appellants Labhu and Sripati suddenly appeared, Labhu armed with a sword and Sripati with a dagger. Saying they were going to kill the Digwar, the two appellants proceeded to attack him, despite the protests of his companions and their somewhat faint-hearted attempt to protect him. Labhu, it is alleged, struck the Digwar with his sword on the left shoulder. The Digwar, who meanwhile defended himself with a swordstick, apparently had not time to unsheath the sword, with the result that the swordstick was split by the blow of Labhu. Sripati then struck the Digwar with his dagger on the back. Labhu gave another blow to the Digwar, who partially warded it off with his left arm and was hurt on his palm and on the fingers of the left hand. The Digwar is then said to have struck Labhu on the right side with a swordstick, and meanwhile Sripati cut the Digwar across the head. The complainant also alleges that he struck Labhu with a stick. The Digwar having fallen down severely wounded, the two accused ran away.

Netai and Akhoy remained with him and bandaged him while Indra and Roshan went for help to the village and to fetch a khatia. About half an hour later, before they returned, Labhu and Sripati, accompanied this time by their uncle Satrugan, a man about 60 years of age, re-appeared on the scene, Labhu with his sword, and Sripati with his dagger, and Satrugan, as alleged in Court by the complainant, armed with a kudali and a stone. It will be observed that this seems a curious combination of weapons for a man of 60 to bring with him to the scene. The witnesses through fear moved aside, on which Satrugan first of all (this is the story in Court) threw the stone at the wounded man, and then all the three hacked at him with their respective weapons. The complainant Netai Das and Akhoy then ran towards Seadih, where they met Bholu Nath Mahato, P. W. 10, and Sujun Mahato, P. W. 6, and others, to whom they narrated what had happened. The party then returned to the spot where they found the Digwar dead with his head almost severed from his body. Then the complainant with Roshan, chaukidar, went to the thana of Gourangdih, three or four miles away from Seadih and lodged the first informa-

tion report, Ex. (1), which, except in one very material particular with which I shall deal later, substantially conforms to the story told now in Court, though it is more concise.

With regard to the motive for this crime the prosecution allege more than one motive. In the first place, it is said that the Digwar ghat of Kitankeari formerly belonged to a relation of the accused. Upendra Mahato, the deceased, was appointed in his place 16 or 17 years ago. On his appointment, Upendra Mahato tried to assert his right to assess the appellants with rent from which they had escaped during the tenure of the office by their Bhumij relation. Then in April 1918 one Nalinakhya Mahato, P. W. 11, a son of the deceased Digwar, prosecuted Labhu and Sripati, the two appellants, and two others not before us, for assaulting him. The result of that prosecution was that one of the accused, it is not clear which, was summoned and the case was eventually compromised by the accused paying Rs. 15-4-0 as compensation to the son of the Digwar. A more immediate and to my mind the more important motive for the crime however is evident. A week or so before this occurrence took place—to be precise on 24th July, three dacoities occurred in Seadih village, and in connexion with them three Bhumijes of Kitankeari had been arrested by the Sub-Inspector, P. W. 12. It is beyond doubt that the deceased Digwar suspected the three appellants as well of complicity in this dacoity and told the Sub-Inspector so. On the morning of the occurrence in the present case, the Sub-Inspector was actually at Seadih from 7 o'clock to 11 o'clock investigating the dacoity cases.

The story of the prosecution is that the deceased Digwar was with his tabedars and chaukidar on his way to the Sub-Inspector to assist him in the inquiry. P. W. 11, the deceased's son Nalinakhya Mahato, alleges that Satrugan came to his father, fell at the latter's feet and begged him not to implicate him in the dacoity. I am of opinion however that the truth of this incident is open to grave doubt and that for the simple reason that although this witness says that Netai and Akhoy were both present, neither Netai nor Akhoy says one word about it. It is one of the many facts on this record which convince me that a most deter-

mined attempt has been made by the prosecution witnesses to implicate the old man Satrugan up to the hilt in this charge of murder. However that may be, the Sub-Inspector undoubtedly proves that the Digwar was assisting him in the inquiry and told him that the three accused were mixed up in the dacoity case. The Sub-Inspector also tells us that he asked the deceased Digwar to watch the movements of the appellants. Now although other Bhumijes were also suspected and some were under arrest I am of opinion that the various incidents in connexion with this dacoity, excepting the incident spoken to by P. W. 11 alone, taken in conjunction with the criminal case in April 1918 and the general ill-feeling as to the rent assessed on the appellants, are ample material on which we may hold that a motive for the crime has been sufficiently established as against the appellants. I agree with my learned brother that it was quite unnecessary as it was irrelevant for the learned Sessions Judge to import into his judgment matters within his own official knowledge from his experience in the district. Such procedure has so often been condemned that it is somewhat surprising to find it still in vogue and resorted to by the learned Judge. This practice was deprecated recently in this Court in *Mangni Lal Marwari v. Emperor* (1).

Now with regard to the witnesses to this occurrence, apart from the complainant we have P. W. 2 Akhoy Degharia, who proves the details of both assaults. Indra, P. W. 3 and Roshan P. W. 4 prove only the first assault, inasmuch as these two went to fetch a khatia after the first attack and did not return in time to see the second one. Then we have P. W. 5 Gora Kora of Seadih who proves the first assault in very general terms, and No. 6 Sujan Mahto who merely proves what Gora told him. No. 7, Liloo Mahato also of Seadih is called merely to corroborate Netai and Thakur as to what they told him about the occurrence which had taken place. P. W. 8 is a purely formal witness, and then we come to P. W. 9 Mangal Mahato. He was with Gora and so his evidence is much on the same lines as that of Gora with regard to the first assault. He says in a general way that he saw two young men, Labhu and Sripati, cutting at the Digwar. This witness

(1) [1917] 48 I. C. 685.

however, unlike witness 5, remained to see the second attack. With regard to this assault he says, he saw the three accused running towards the Digwar, Satrughan with an axe and a stone. The assault itself he did not witness. Criticisms of these witnesses by Mr. Nandkeolyar who has argued the case with lucidity and fairness are as follows :

With regard to witnesses 2, 3 and 4 he contends that they are tabedars and underlings of the deceased. There is however nothing in their evidences to show that there was any sort of friction or ill feeling between them and the appellants. The mere fact that they were tabedars is not to their discredit, having regard to the fact that the deceased Digwar would naturally be accompanied by his tabedars and chaukidar, when proceeding to Seadih to help the Sub-Inspector in the latter's investigation. Their presence there, to my mind rather strengthens the general case for the prosecution than weakens it. I therefore attach considerable importance to the evidence of these three eyewitnesses.

They were the most likely people to be with the deceased, and on the whole they have given their evidence, except in regard to the part played by Satrughan, with moderation and without any attempt to exaggerate or embellish the facts against the other two appellants. The contention regarding P. Ws. 5 and 9 is that they are servants of Lambhodar Mahato, in whose house one of the three dacoities had taken place in which the three accused were suspected. Examining their evidence however one finds that Gora, P. W. 5, speaks of the first assault only in general terms, while P. W. 9 does much the same, and I apprehend that if they were untruthful witnesses, they would have deposed to more details in order to corroborate the other witnesses. It is common ground that the place of the assault is not far from cultivated fields, as the map shows, and therefore it is not surprising that there should have been cultivators about at the hour at which this occurrence took place. Then with regard to witnesses 6 and 7, they are, contends learned counsel, relations of Lambhodar Mahato, but as I have already mentioned, witnesses 6 and 7 really carry the prosecution no further than this: namely, that the other witnesses told them a story similar to that told

in Court. Now if we accept, as we must accept, the first information report, the evidence of these witnesses is of very little avail. Had there been any great delay in lodging the first information report, it may have been urged that these witnesses had been imported into the case in order to meet the point that the interval had been spent in concoction. That however is not the case here, as the first information report was lodged with reasonable promptitude. As for the complainant, it is noticeable that the only suggestion against him is a vague one that his house was searched at the instance of Labhu; there is no evidence of this fact and the learned counsel for the appellants has been constrained to concede that there is nothing particular to urge against the evidence of this witness.

I accordingly hold that the witnesses have substantially told the truth with regard to the parts played by Labhu and Sripati. There can be no doubt that the deceased Digwar was killed in broad daylight, near two villages, not far from open fields, that he was going to Seadih to help the Sub-Inspector and would naturally be accompanied by the witnesses who come to prove how he met with his death. Further the medical evidence to a large extent corroborates the prosecution story. That evidence has been dealt with by my learned brother, and I need only point out that one of the medical witnesses establishes no less than nine incised injuries on the person of the deceased, more or less in the positions we would expect to find them on the evidence of the eyewitnesses to the occurrence. Then another medical witness, P. W. 10, establishes that Labhu had a superficial cut 2 inches into 2½ inches on the right side of the back of the chest. He also had two other scratches. This, combined with the evidence of the Sub-Inspector P. W. 12 to the effect that Labhu when arrested had a cut mark on his rib and bruise on his head and another on his left shoulder, corroborates the incident told not only in Court but mentioned in the first information report a few hours after the occurrence, that Labhu had been struck by the deceased Digwar. The result therefore is that I am satisfied as to the propriety of the convictions of Labhu and Sripati, and I am also constrained to hold that no extenuating circumstances exist, and the sentences passed on them

by the learned Sessions Judge must be upheld.

There remains the case however of Satrugan. His own statement, which is to the effect that he and he alone killed the deceased owing to certain provocation in the shape of attempts on the part of the deceased to outrage the modesty of his womankind, has been rejected by the learned Sessions Judge. I agree in the view taken by the learned Sessions Judge. It is impossible to suppose that a man of 60 by himself could have caused all these injuries. It appears that he made a somewhat similar statement on the night of the occurrence to the Sub-Inspector, and that, to my mind, has been taken advantage of by the prosecution witnesses in this case in order to implicate him in a charge of murder along with his nephews. Now on the first information report Netai narrated the part taken by Satrugan in these words:

"From a little distance we saw that Labhu Patar gave one stroke on the neck of Upendra Mahato with the sword and Sripati also gave one stroke with the dagger. Shabinghna (Satrugan) Patar took a stone and threw it on the body of Upendra Mahato."

Then again P. W. 2 in cross-examination, when asked more precisely as to the part taken by Satrugan (after he had already said in a general way that the three accused backed the deceased), stated: "Satrugan had an axe and a stone I saw Satrugan striking him with a stone." Now it is somewhat surprising if he had an axe and a stone that the old man should not have used the axe, but should have struck the deceased with a stone. I accept, as my learned brother does, the first information report as the most reliable evidence on this part of the case, and I refuse to believe the very different version given in Court. It is inconceivable that the first informer and Nalinakhya Roy, who were both present when the first information report was recorded and who were both eyewitnesses to this incident, should have omitted to tell the Sub-Inspector that Satrugan did nothing more than hurl a stone at the body of Upendra Mahato after the other two had attacked him. It must be remembered that the informants actually narrated to the Sub-Inspector in detail the precise part played by each of the assailants, and I am of opinion that they could not have forgotten so vital a

particular as the assault by Satrugan were with an axe, if indeed it were true.

It therefore comes to this: that Satrugan came with Labhu and Sripati; it is not clear whether he actually arrived at the spot, where the wounded Digwar lay simultaneously with the other two appellants; and without more definite evidence on the record to establish this I for my part, would not draw any inference against him on this point. It may well be that the old man lagged behind and would nevertheless have been said to have arrived with the other two. The sequence of the assaults as narrated in the first information report goes to show that he in fact arrived after the other two, and it is strange that if he arrived with the other two he did not take any part in attacking the wounded man until the other two had finished with him.

That being so the learned Government Advocate has been obliged to fall back on S. 34, I. P. C., in order to ask us to hold that Satrugan was equally guilty under S. 302. Now there must be evidence from which one might reasonably infer a common intention infecting each of the accused, in order to apply S. 34 and hold each accused responsible for the act done by several persons in furtherance of the common intention of all. As Mr. Gour rightly observes in his valuable work on the I. P. C. the presumption of constructive intention must not be too readily applied or pushed too far. It is obvious that the mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under S. 34; the former by itself is irrelevant to the section. It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that S. 34 may be applied.

If authority is needed for these propositions, I would refer to the case of *Queen-Empress v. Duma Baidya* (2), where the facts were that accused 1 struck the deceased on the head with a bludgeon, accused 2 struck him across the chest with a cane and accused 3 put his foot on him and pummelled him

(2) [1896] 19 Mad. 483.

after he fell. The medical evidence showed that the cause of death was a blow on the head which fractured the skull; the deceased died in hospital two days later. The Sessions Judge found all the three guilty of murder, and passed sentences accordingly. The High Court held that no common intention to cause death could be inferred against accuseds 2 and 3 from their particular acts of violence, which in no way contributed to the death of the deceased, though the object of all was, no doubt, to give the deceased a beating.

It will be observed that Satrugan's case is a good deal stronger than that case, inasmuch as in that case accused 3 trampled on the victim and pummelled him while he was still alive, while in this case, Satrugan merely hurled a stone at the Digwar when it is extremely doubtful whether the latter was alive at all. The decision in *Queen-Empress v. Duma Baidya* (2) was followed by the Allahabad High Court in *Emperor v. Bhola Singh* (3). In the latter case three persons attacked a fourth with lathis and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt which of the three assailants struck that blow. The Sessions Judge found all the accused guilty under S. 304, I. P. C. The High Court held that there was nothing to show that there was a common intention on the part of all the three assailants to inflict such injury as was likely to cause death and so S. 34 would not apply. The convictions were altered to convictions under S. 325. The point again arose in *Gouridas Namasudra v. Emperor* (4). In that case the prosecution story was that the deceased was waylaid and assaulted by the three appellants out of revenge. The medical evidence showed that the deceased received six injuries including three severe injuries on the head, one of which injuries was the cause of his death. The Calcutta High Court in these circumstances observed:

"In the circumstances of this case we are not prepared to hold that the appellant, who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck by the others in prosecution of the common object of punishing the deceased for his interferences and for the damage done by his cattle."

(3) [1907] 29 All. 282.

(4) [1909] 36 Cal. 659=2 I. C. 841.

Now again in that case it will be noticed that the appellant was one of the party who deliberately waylaid the deceased and actually attacked him with a lathi; nevertheless the Calcutta High Court held that that by itself was not sufficient to establish any intention to cause death, and S. 34 could not be applied in order to convict the appellant for the graver offence with which he was charged. In *Emperor v. Ram Newaz* (5) all these cases were considered and distinguished. It was observed that the facts and circumstances of cases vary, and each case has to be decided in view of its actual facts. The learned Judges also held that whether there was or not premeditation in the case before them was not clear, but there was concerted action and the attack was so ferocious as to lead almost to the inference that it had been premeditated and the death was the result of the many blows inflicted on the head by all the appellants.

Now the medical evidence in the case before us is most precise with regard to one matter, and that is that death was instantaneous after injury No. 1 was inflicted, as the Assistant Surgeon deposes. My learned brother has already shown that injury No. 1 must have been caused during the second assault and with that opinion I entirely agree. That being so, taking the order of sequence of the assault given in the first information report I consider it would be most unfair to the appellant Satrugan to hold anything less than that when he threw the stone the Digwar was already dead; in which case no offence whatever was committed by him. The result therefore is that with regard to Satrugan I also agree with my learned brother that he should be acquitted and released from custody.

v.S./R.K.

Order accordingly.

(5) [1913] 25 All. 506=21 I. C. 663.

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ATKINSON AND COUTTS, JJ.

Jumra Prasad Singh and others —
Plaintiffs—Appellants.

v.

Basdeo Singh and others—Defendants
—Respondents.

Second Appeal No. 506 of 1918, Decided on 4th April 1919, from decision of Dist. Judge, Patna, D/- 18th January 1918.

Bengal Tenancy Act (1885), S. 86—Surrender by Hindu widow — Widow's right is not unqualified—Surrender of her entire interest in raiyati holding only amounts to transfer of her limited interest in such holding — Hindu Law—Widow.

If a Hindu widow has any right of surrender under S. 86 at all, she only has such right subject to the disability and limitation which attaches to her interest in the holding as a Hindu widow. She has not an unqualified right or power to surrender the entire raiyati interest in a raiyati holding to which she succeeds, as heir of her husband in the absence of proof of legal necessity or pious purposes. [P 122 C 1,2]

A surrender by a Hindu widow of her entire interest in a raiyati holding, of which she is for the time being in occupation, to her landlord, if it forms merely a part of the estate to which she succeeds is a transfer by such Hindu widow of her limited interest in such holding which the law sanctions and recognizes. This right of transfer by way of surrender is vested in every Hindu widow irrespective of the provisions of the Bengal Tenancy Act. [P 123 C 2]

*Fakhruddin and Rajendra Prasad—*for Appellants.

*Nurul Hussain and Kulwant Sahay—*for Respondents.

Judgment.—This second appeal comes before us from the decision of the learned District Judge of Patna, dated 18th January 1918.

The plaintiffs claim a declaration that they are entitled to the absolute raiyati interest in the lands in suit, or in the alternative that they are entitled to an estate therein during the life of Mt. Deopati Koer. The facts connected with this case may be briefly stated.

One Mahangu Singh was formerly the tenant of 9·28 acres of land situate in Mauza Manikantapur and in respect thereof he had occupancy rights. The plaintiffs are the zamindars of this holding. The 9 odd acres of land forming the subject-matter of dispute in this suit was part of the estate and assets of which Mahangu Singh died possessed at his death. Mahangu Singh died in the year 1318, leaving him surviving a childless widow whose name was Mt. Deopati Koer.

Mahangu's widow entered into possession of the lands in suit together with such other lands as Mahangu died possessed of; and she continued in possession of the lands, the subject of this suit, until the year 1320.

By the year 1320 a large arrear of rent had accumulated in respect of the aforesaid holding comprising 9 acres odd, which was payable to the plaintiffs. It is stated that Mt. Deopati was unable to

discharge the arrear of rent due, which is alleged to have amounted to Rs. 550. Mt. Deopati, being unable to pay and satisfy the rent due to the plaintiffs, surrendered her interest in the 9·28 acres forming the holding, the subject-matter of this suit, to the plaintiffs as the landlords thereof under a deed of surrender dated 26th July 1916.

Mt. Deopati succeeded to the moveable and immovable property of which her husband died possessed as his heir, and became entitled to a Hindu widow's estate therein. The defendants are alleged to be the reversionary heirs of Mahangu Singh; and as such they claim that Mt. Deopati Koer forfeited all her estate and interest in her husband's property as his heir by reason of her unchastity in the lifetime of her husband, and consequently that her estate as a Hindu widow never came into being, and that she was not in possession of or entitled to surrender to the plaintiffs the lands in suit.

Both the lower Courts agree that this allegation by way of defence put forward by the defendants was unsustainable on the facts; as Mt. Deopati Koer was not an unchaste Hindu woman during the lifetime of her husband; though since his death it would appear that she had become unchaste with a ploughman in her service.

When I say that the defendants claim to be reversionary heirs of Mahangu Singh, I desire it to be clearly understood that their right as such has not been as yet legally determined; but in this suit they impeach the validity of the deed of surrender dated 26th July 1916 claiming in the capacity of reversionary heirs of Mahangu Singh.

As far as we can ascertain from the evidence on the record, Mt. Deopati Koer entered into and is now in possession of all the immovable property of her husband to which she succeeded on his death save the 9 odd acres in suit. The deed of surrender to which I have referred only applies to a portion of the property to which she became entitled as her husband's heir.

The learned Munsif who tried this case held that the plaintiffs were not entitled to an absolute raiyati interest in the aforesaid holding, but that at most they had only an interest during the continuance of the life of Mt. Deopati

Koer as a Hindu widow ; and that all that in effect it was possible for Mt. Deopati Koer to assign or transfer by the deed of surrender dated 26th July 1916 was her life or limited interest in the holding as a Hindu widow.

The learned District Judge arrived at a different conclusion, and he dismissed the plaintiffs' suit holding that the deed of surrender executed by Mt. Deopati was an attempt on her part to destroy a portion of the estate of her husband to which she succeeded as the effect of the surrender in favour of the plaintiffs would operate to work a merger of the raiyati interest in the holding and that the surrender would in such event be destructive of a portion of the corpus of her husband's property which descended to her as his heir, and that therefore the interests of reversionary heirs were prejudicially affected, and as no legal necessity could be shown to support the deed of surrender it was absolutely void.

The learned Government Pleader appears in this case on behalf of the plaintiffs-appellants, and his argument before us is twofold : first he contends that by virtue of the operation of S. 86, Ben. Ten. Act, a Hindu widow is entitled in point of law absolutely to assign the entire raiyati interest in a holding to which she succeeds as a Hindu widow as heir to her deceased husband; and that thus the deed of surrender of 26th July 1916 did effectually and legally operate to convey to the plaintiffs the entire raiyati interest in the holding of 9 odd bighas which formerly has formed part of the estate of Mahangu Singh. No authority was cited to support this contention. Mr. Fakhruddin's argument was founded upon the power of surrender expressly conferred on a raiyat of a holding by S. 86, Ben. Ten. Act; and he contended that a Hindu widow who is or may be a raiyat of a holding as such to which the Bengal Tenancy Act applies, has an unqualified right and power of surrender; and that this statutory power should not be abridged or restricted in its exercise even in the case of a Hindu widow.

We are unable to assent to Mr. Fakhruddin's argument, because we are of opinion that if a Hindu widow has any right of surrender under S. 86, Ben. Ten. Act, at all, she only has such right subject to the disability and limitation

which attaches to her interest in the holding as a Hindu widow; and that she has not an unqualified right or power to surrender their entire raiyati interest in a raiyati holding to which she succeeds as heir of her husband in the absence of proof of legal necessity or pious purposes.

If the power of surrender conferred by S. 86, Ben. Ten. Act, is applicable to a Hindu widow, who for the time being may be the raiyat of the holding, such power of surrender can only operate to affect the interest which she has in a raiyati holding and no more. She does not represent the entire raiyati interest, but only an estate or interest therein limited and co-extensive with the quantum of estate which she herself has as a Hindu widow.

The second branch of Mr. Fakhruddin's argument is that the plaintiffs have acquired by virtue of the deed of surrender of 26th July 1916 a raiyati interest in the holding in suit for and during the life of Mt. Deopati Koer as her transferees.

Now much argument has been addressed to us on behalf of the defendants for the purpose of establishing—the Bengal Tenancy Act apart—that Mt. Deopati had no power even to assign by way of transfer at Common law her life-interest in the lands in suit to the plaintiffs, the same forming only a part of her husband's estate that descended to her.

Two points were urged in support of this contention, one was that the raiyati interest in the holding, which was transferred to the plaintiffs as landlords by Mt. Deopati Koer, operated to create a merger of such interest by the union of the lesser interest merging in the larger estate to which the plaintiffs as landlords were entitled. And the second contention put forward in support of such proposition was that the effect of the surrender, even if merger did not operate, would be to destroy the estate of the reversionary heirs, inasmuch as if a letting of the holding so surrendered was made by the landlords to a tenant that then such tenant would acquire by time occupancy rights in defeasance of the right of the reversioners to possession of the lands forming part of the estate descendible to them from the last male owner.

It appears to us to be settled by the Common law that a Hindu widow, with-

out necessity, irrespective of the provisions of the Bengal Tenancy Act as to the power of surrender, may transfer or assign her limited interest in a part of the property to which she succeeds as a Hindu widow to a stranger and that such assignment or transfer is valid during the continuance of the Hindu widow's life. Such a contract is not void but voidable; and until avoided or set aside is binding and operative as against the widow at the instance of such stranger and transferee.

The law is I think, accurately stated in Mayne's Hindu law, 8th Edn. p. 882, where he says :

"It must be remembered, that in regard to her alienation it is not a question of absolute but of relative invalidity. She cannot, in the absence of legal necessity, bind the inheritance for her own personal debts or private purposes as against reversioners, but she can do so for her own life."

The law on this subject, as to a Hindu widow's right to transfer part of her husband's estate to which she succeeds, seems to me to have been very fully considered and discussed in the case reported as *Durga Kunwar v. Matrumal* (1). Banerji, J.'s exposition of the law is, in my opinion, clear and precise, and leaves no room for doubt as to what the law is, and I think the principles underlying the decision cited have been recognized by the Privy Council in a ruling reported as *Bibi Sahodra v. Rai Jang Bahadur* (2). Banerji, J., says at p. 319 (of 35 All.) :

"She (the Hindu widow) has no power absolutely to alienate the estate or a part of it, whether moveable or immovable, except for certain purposes, but if she alienates it the transfer is, in every case, valid during her lifetime and will have full effect and operation till her death. The only distinction between an alienation for a legal necessity and any other alienation is that the former enures after her death and is binding on the reversioners, whereas in the case of the latter it has full force and effect till her death, but may be avoided by the reversionary heirs of her husband after her death. From the operation of the above rule no class of property is exempt and it applies as much to mortgagee rights as to any other rights. Therefore when a Hindu widow sells the mortgagee rights which she inherited from her husband, but the sale is without legal necessity, the transferee, in my opinion, acquires all the rights which the widow had and could exercise during her lifetime in respect of the mortgage."

This expression of opinion of Banerji, J., was affirmed by a Full Bench of the Allahabad High Court which agreed

with Banerji J.'s view of the law, and the learned Judges, say at p. 323 (of *I. L. R.* 35 All.) of the same report:

"She is entitled to enjoy and spend the whole income of the estate, though she can be restrained from wasting and destroying the corpus and there is nothing in law to prevent her from transferring her so-called life-interest. A transfer by her of the corpus of the estate without legal necessity and not for a pious purpose, is not void, but is voidable by the reversioners and may be so declared at their instance" : see also to the like effect the case reported as *Sarabjit Pratap Bahadur Sahi v. Mt. Bhagwat Koeri* (3), in which the Calcutta High Court assented to the same principle."

A surrender is a transfer by one person to another of an interest in moveable and immovable property. The term surrender in legal phrasology is applied to a transfer by a tenant to his landlord of the interest which he possesses in certain immovable property with the landlord's assent. Surrender means the 'giving up of a right or interest'; and the giving up is effected by a transfer of what is to be given up by one to another willing to receive it. A surrender is no technical term of art; though legal decisions have hedged it round with certain conditions necessary for its validity. Therefore I hold that a surrender by a Hindu widow of her entire interest in a raiyati holding of which she is for the time being in occupation to her landlord, if it forms merely a part of the estate to which she succeeds, is a transfer by such Hindu widow of her limited interest in such holding which the law sanctions and recognizes. And in my opinion this right of transfer by way of surrender is vested in every Hindu widow to the extent stated, irrespective of the provisions of the Bengal Tenancy Act.

It appears to me that Mt. Deopati had not on 26th July 1916 the interest which would have enabled her to have surrendered or disposed of by transfer the 16 anna raiyati interest in the lands forming the subject-matter of this suit within the meaning of S. 86, Ben. Ten. Act, in the absence of legal necessity to render such transfer binding on the inheritance and the reversionary heirs of her husband. All that she had was the interest of a Hindu widow in a raiyati holding; and all that she could possibly dispose of by way of transfer or surrender by deed—call it what you will—in the absence of legal

(1) [1913] 35 All. 311=19 I. C. 138.

(2) [1892] 8 Cal. 224=8 I. A. 210 (P. C.).

(3) [1915] 30 I. C. 578.

necessity, was her limited interest ; this she did effectually, in our opinion, by the deed of surrender to which I have referred. This really disposes of the argument urged on behalf of the defendants before us ; but I think it right to deal very briefly with the two contentions put forward in support of that argument. The first is the question of merger. It is contended that there has been a merger by virtue of the deed of surrender ; the deed having been made by a Hindu widow in favour of the plaintiffs who were zamindars of the property so surrendered. With that view I cannot agree, and for this reason, that a merger could only take effect if there was a complete surrender of the entire raiyati interest in the holding in suit, but that inasmuch as there was only a surrender of the Hindu widow's limited interest in the holding that a merger of the 16 anna raiyati interest in the holding cannot be presumed to ensue, in the absence of legal necessity. Merger according to modern law is governed by the principles laid down by Courts of equity of England, which treated the applicability or non-applicability of the doctrine of merger as based on intention ; and if the intention was that a property or interest surrendered was not to merge then even though it became vested in a person having a higher right and larger interest, the intention excluded a merger taking effect.

I do not think it necessary to express any decided opinion as to whether if a letting is made by the plaintiffs of the lands in suit who are only entitled to a Hindu widow's estate therein that such a letting will operate to defeat or affect the interest of the defendants as reversioners on the death of the widow to the possession of the holding to which they would then become entitled. That is a matter that can be fully discussed at a proper time if such an incident occurs. But as at present advised I am of opinion that such a letting made to a tenant by the plaintiffs, as transferees of a Hindu widow's estate, would not operate to bar or defeat the rights of the reversionary heirs upon the death of the widow. I am of opinion that the learned District Judge was wrong in the conclusion at which he arrived ; that in law he should not have dismissed the suit, but should have affirmed the decree of the

learned Munsif. We are satisfied that the learned Munsif's decision is right in point of law, and accordingly we will set aside the judgment of the learned District Judge in appeal and affirm the decision of the learned Munsif. Accordingly this appeal will be allowed with costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 124

JWALA PRASAD, J.

Haradhan Mahto and others—Plaintiffs—Appellants.

v.

Litto Manjhi and others—Defendants—Respondents.

Second Appeal No. 338 of 1917. Decided on 12th June 1918, from decision of Sub-Judge, Purulia.

Civil P. C. (5 of 1908,) O. 41, R. 31—Omission to consider important evidence vitiates judgment.

The omission to consider an important piece of evidence by an appellate Court amounts to an error in procedure and vitiates the judgment of the Court. [P 126 C 1]

Abani Bhushan Mukerjee—for Appellant.

Mirtunjoy Lal—for Respondents.

Judgment.—The plaintiff is the appellant. He brought a suit in the Court of the Munsif of Purulia for a declaration that the land in dispute appertains to a Chak which he had taken settlement of from the landlord. The settlement of the plaintiff's Chak was by means of a registered lease executed by the landlord in 1906. The plaintiff's case was that he was in possession of the land in suit by virtue of the aforesaid lease until he was dispossessed in 1316 by some persons other than the defendants and that he succeeded in obtaining a decree for possession against those persons and subsequently obtained delivery of possession through the Court in 1319. But he was soon dispossessed by the defendants who cut away the paddy crops grown by him. The cause of action is stated in the plaint to be the month of Aghrayan 1319. The defendant, on the other hand, resisted the claim of the plaintiff, claiming that the disputed land was within his Chak which he had taken settlement of from the landlord by means of an Amalnama in the year 1905, a year prior to the lease in favour of the plaintiff. The Amalnama in favour of the defendant was not registered nor was any lease executed. The

Munsif held that the Amalnama of the defendant was not a genuine document and as regards the title of the plaintiff he held as follows:

"I believe the statement of the plaintiff and hold that the disputed land forms a part of his Chak."

Upon that finding the suit was decreed by the Munsif. On appeal by the defendant the learned Subordinate Judge dismissed the suit by his judgment dated 11th January 1917. The Subordinate Judge held, disagreeing with the Munsif that the Amalnama in favour of the defendant was a genuine document and that in consideration of the respective boundaries given in the lease of the plaintiff and the Amalnama of the defendant he came to the following finding:

"That being the case, the disputed land is included in the defendant's Chak and so must have been excluded from the plaintiff's lease."

As to the possession the Subordinate Judge recorded the following findings:

"The evidence of possession is not very satisfactory. It is clear that the plaintiffs did not possess the lands since 1316. Their story that they got possession for a short time in 1319 is unworthy of credit."

He sums up his finding in the following words:

"On the whole therefore I am not satisfied that the disputed land is in plaintiffs' Chak. I am rather of opinion that it is in defendant's Chak."

The above is practically the entire judgment of the Subordinate Judge, barring his discussion about the boundaries in the lease. It is contended on behalf of the plaintiff-appellant that the judgment is not in accordance with law and that the most important evidence in the case, namely, the map and the Commissioner's report, was not considered by the Subordinate Judge. In order to appreciate this contention, it is necessary to state that the defendant's and the plaintiff's Chaks are contiguous and that the defendant's Chak is west of the plaintiff's. The land in dispute is claimed by each of the parties as forming part of his Chak. It will not therefore be possible from the boundaries given in the leases to find out whether the disputed land would be within the plaintiff's Chak or within that of the defendant's. This was realized by the defendant, as will appear from para. 4 of the written statement which runs as follows:

"On looking into the plaint, the exact position of the land in suit cannot be exactly ascertained. This can be ascertained by a local inspection. The boundaries stated by the plaintiff are not

correct. The suit of the plaintiff cannot proceed unless he files the correct boundaries."

In para. 7 of the written statement it was stated that

"the plaintiff had and has land in the east of Kali Manjhi's land which was situated in the east of these defendants. Now the plaintiff is trying to extend his land still further west of Godahar by altering the boundaries."

On 10th September 1915, the plaintiff applied to the Court below for a local inquiry by commission in order to find out whether the land in dispute was situated within the plaintiff's Chak or not. On 17th September after hearing the parties the Court passed the following order:

"It is necessary to determine if the disputed land is covered by the plaintiff's lease and also to ascertain its position with reference to the land in Suit No. 227 of 1911, relaying the common boundary between the two Mauzas of Ladadih and Mangura. The plaintiff do deposit within four days the fees and expenses."

A Commissioner was appointed, who went to the locality and prepared a comparative map as directed by the Court and filed it with his report on 25th April 1916. An objection was filed by the defendant in the Court of the Commissioner on 27th June and it was ordered to be taken up on the next date fixed in the case. After various adjournments the case was tried by the Munsif from 26th to 31st July 1916. On the last date the order of the Court is as follows:

"Argument of both sides pleaders heard. Commissioner's map and report put in evidence. Judgment delivered. Suit decreed with costs."

The report and the map, however do not bear any exhibit mark; and it does not appear from the order-sheet or from the judgment that the objections of the defendant as to the Commissioner's report and map were at all considered. Be that as it may, after the close of the case and probably after the arguments on both sides were heard the Commissioner's map and report were put in evidence. Both the parties and the Court considered that the report of the Commissioner would be very valuable, and various dates were fixed from time to time for the purpose of enabling the Commissioner's report to be put in. It is curious, therefore, that the map and the report of the Commissioner were not at all considered by the Munsif, for there does not appear to be any reference to them in the judgment. The report of the Commissioner was in favour of the plaintiff but it does

not appear to have been considered by the lower appellate Court. The result is that this appeal was decided by the lower appellate Court without considering a very material piece of evidence in the case. I agree entirely with the view of the case taken by the defendants themselves in their written statement that it is impossible to determine precisely whether the disputed land lay within the plaintiff's or the defendant's Chak without a local investigation and a comparative map of the two villages. The omission to consider this important evidence to my mind vitiates the judgment of the Court below and amounts to an error in procedure which may have prejudiced the plaintiff not having a correct finding upon his title to the disputed land, as held in *Tirthabasi Sing Roy v. Bepin Krishna Roy* (1) and *Dilan Singh v. Choa Singh* (2). It is contended on behalf of the respondent that this appeal could be decided even if the report of the Commissioner be accepted that the disputed land was within the plaintiff's Chak.

This contention is based upon the fact that the Amalnama in favour of the defendant is of the year 1305, that is, a year before the plaintiff's lease; and hence the disputed land being within his Chak, the plaintiff could not derive any title by having the lease of the land subsequent to that of the defendant. I am afraid I cannot be in agreement with this view, inasmuch as the plaintiff's lease is a registered one and the defendant's Amalnama is an unregistered document; this being the case, an important question would then arise under S. 50, Registration Act 16 of 1908, whereby a duly registered lease would take effect as regards the property comprised therein against every unregistered document relating to the same property. In the second place, the judgment of the Court below dismissing the suit of the plaintiff is based upon the finding that the disputed land is not within the plaintiff's Chak. We do not know and it is impossible for this Court to surmise what would have been the result of the judgment of the Subordinate Judge if he had come to a conclusion that the disputed land is within the plaintiff's Chak. It is also open to doubt in what light

then the learned Subordinate Judge would have viewed the oral evidence as to possession. I therefore think that the finding of the Court below that the disputed land is not within the plaintiff's Chak has not, as has been observed above, been arrived at upon a consideration of all the evidence in the case, particularly the important evidence afforded by the Commissioner's report and map. This necessitates a remand of the case to the Court below for the purpose of considering the Commissioner's report and map and then recording a finding upon the issue "whether the land in suit is included in the plaintiff's Chak or not." It will of course be open to the defendant to raise the point that he wanted to raise here after having a clear finding upon this question of fact involved in the said issue. The Court below will also consider the objection, if any, of the defendant regarding the report of the Commissioner and if it agrees with the objection of the defendant then it will be necessary to have another Commissioner appointed in order that he may, after a local inspection submit a report together with a comparative map of the two Chaks in terms of the order given by the Munsif for the issue of the commission on 17th September 1915.

As the case is being remanded, it is necessary to direct the Court below to come to a definite finding upon another part of the case, namely, as regards the allegation of the plaintiff regarding his possession on the basis of the lease. Upon that point the summary of the judgment quoted above would show that the finding of the Subordinate Judge is not clear and satisfactory. The Court below has no doubt held that the plaintiff did not possess the land since 1316, and that the plaintiff's story as to his having got possession in 1309 is not worthy of credence. There is a big gap between the year 1306 when the lease of the plaintiff was taken and the year 1316. The plaintiff's case as stated in his plaint is that he took the lease and was in possession of the disputed land ever since the lease was executed, that is, since 1306. The finding of the Munsif also upon this point is not clear and as a matter of fact his whole finding consists of one sentence:

"I believe the statement of the plaintiff and hold that the disputed land forms a part of his Chak."

(1) [1916] 34 I. C. 30.

(2) [1917] 42 I. C. 397.

The learned Munsif has not addressed himself to the question of possession. The Subordinate Judge on the other hand has arrived at a vague and uncertain finding. It is therefore directed that a clear finding be arrived at by the Subordinate Judge upon this point also, namely, whether the plaintiff was in possession from 1306, when the lease was taken up by him up to 1316. The judgment of the Court below is not in accordance with law: *Laloo Singh v. Tahbal Gope* (3) and *Devendra Nath Chowdhry v. Annada Hadi* (4). The case is therefore remanded to the lower Court with a direction that the finding be returned to this Court upon the aforesaid points by the end of July next. Costs will abide the result.

V.S./R.K.

Case remanded.

(3) [1917] 38 I. C. 814.

(4) A. I. R. 1914 Cal. 784=25 I. C. 576.

A. I. R. 1919 Patna 127

MULLICK AND JWALA PRASAD, JJ.
Brij Kishore Lal—Petitioner.

v.

Pratap Narain—Opposite Party.

Civil Revn. No. 11 of 1919, Decided on 1st May 1919, from decision of Dist. Judge, Patna, D- 20th December 1918.

Civil P. C. (1908), O. 21, R. 90—Reversioner can set aside sale—Hindu Law, Reversioner.

A reversioner to a Hindu widow's estate is entitled to apply to set aside a sale under O. 21, R. 90. [P 127 C 2]

Kulwant Sahay, Khurshaid Husnain, Kailaspati, Siveswar Dayal and Nawal Kishore Prasad 2—for Petitioner.

P. K. Sen, Ganesh Dutt Singh and Jalgobind Singh—for Opposite Party.

Mullick, J.—The first question is whether a reversioner to a Hindu widow's estate is entitled to apply under O. 21, R. 90, Civil P. C., to set aside the sale of immovable property. In order to consider the effect of the amendments to S. 311 of the Code of 1882, which is now replaced by R. 90, it will be helpful to consider also the provisions of the cognate S. 310-A, which is now represented by R. 89. Under S. 310-A a person whose immovable property had been sold was competent to make a deposit to have the sale set aside, and it was held that the provision applied to a reversioner whose interest purported to have been sold by the Court: *Pankhabati Chaudhurani v.*

Nonihal Singh (1). In my opinion what has to be looked at, whether under S. 310-A of the Code of 1882 or under O. 21, R. 89 of the present Code, is not what the Court can sell but what it purports to sell and if in that which has been sold any person has an interest as distinguished from mere personal claims relative to the property, then that person is certainly competent to make a deposit. It follows therefore that those who have an interest paramount to that of the judgment-debtor are not affected by the sale and cannot apply. It is not necessary that the applicant should have an interest in praesenti. It is now settled that, although the reversioner has only a spes successionis which is not a transferable interest within the meaning of the Transfer of Property Act, he has an interest which entitles him to protect the corpus and to obtain declarations with the object of ultimately recovering it when the reversion opens, and I agree that he would be still entitled under the present Code to apply under O. 21, R. 89.

Under S. 311 of the Code of 1882 the reversioner would have been no less competent to apply to set aside the sale; for that section, too, conferred the power to do so upon a person "whose immovable property had been sold." O. 21, R. 90 of the present Code goes, in my opinion, still further and the words "whose interests are affected by the sale" would seem to include not only a reversioner but possibly also persons who have no interest in the property itself, such as persons entitled to specific performance under a contract for sale, or licensees. It is not necessary however to decide for the purposes of the present case how wide the scope of the word "interests" is; it is sufficient to say that it includes a reversioner in the position of the petitioner before the Subordinate Judge. The next question is whether assuming that the petitioner in question can apply, we should interfere with the order of the learned District Judge. Now the Subordinate Judge held that the petitioner was incompetent to apply and also that there had been no inadequacy of price. The District Judge disagreed on both points and set aside the sale.

The decree-holder then moved this Court and obtained a Rule only in respect of lots Nos. 4, 5 and 6. In support

(1) [1913] 21 I. C. 207.

of the Rule it is contended before us that the learned District Judge has declined to exercise jurisdiction by coming to no finding on the point whether there has been any inadequacy of price in respect of these lots. The learned District Judge appears to have thought that there was some doubt as to what, if any, saleable interest the judgment-debtor had in these lots by reason of a previous auction-sale, and, as there was no clear finding upon the point by the Subordinate Judge, he set aside the sale of these lots too. I think under the circumstances the learned Judge acted quite rightly, and there was no refusal on his part to exercise jurisdiction. The result is that the application is rejected with costs. Hearing-fee three gold mohurs.

Jwala Prasad, J.—I agree.

V.S./R.K. *Application rejected.*

A. I. R. 1919 Patna 128

ATKINSON AND DAS, JJ.

Mt. Binda Bibi—Decree-holder—Appellant.

v.

Muni Singh—Judgment-debtor—Respondent.

Appeal No. 261 of 1918, Decided on 13th February 1919, from appellate order of Dist. Judge, Patna.

Bengal Tenancy Act (1885), Sch. 3, Art. 6
—Decree obtained against cosharer tenant—Art 6 applies.

A cosharer tenant is a tenant, and a suit for rent brought against such tenant is a suit between a landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable. Therefore Art. 6, Sch. 3 of the Act, is applicable to a decree obtained in such a suit. [P 128 C 2]

Gangadhar Das and Panchanan Banerji—for Appellant.

Bimala Charan Sinha—for Respondent.

Das, J.—On 8th February 1913 the appellant before us obtained a decree in Rent Suit No. 102 of 1913, against the respondent in respect of arrears of rent for the years 1316 to 1319. On 11th September 1915 the appellant executed her decree and realized the sum of Rs. 105. On 15th April 1918 she presented her second application for execution and was met with the objection on behalf of the judgment-debtor that the application was barred by the special rule of limitation provided by Art. 6, Sch. 3, Ben. Ten. Act. This argument found favour with the Courts below and

the decree-holder now appeals to this Court and Mr. Gangadhar Das on her behalf puts forward the argument that the decree not being what is known as a rent decree, the same having been obtained by her against a cosharer tenant, Art. 6 has no application.

Article 6, Sch. 3, Ben. Ten. Act, provides that for the execution of a decree or order made in a suit between landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, the period of limitation should be three years from the date of the decree or order. Mr. Gangadhar Das relies upon the case of *Syed Muhammad Mahboob v. Bhagoo Mahto* (1). That case is an authority for the proposition that where in a suit for rent the landlord does not implead his cosharers, such a decree is not what is called a rent-decree and consequently the holding does not pass to the purchaser at the auction sale free from encumbrances. It is no authority for the entirely different proposition that Art. 6 is restricted in its operation to applications for execution of rent decrees. The question has been debated more than once in the Calcutta High Court and although a different view was taken in the case of *K. B. Dutt v. Gostha Behary Bhuiya* (2), it is now established beyond controversy that Art. 6 is applicable where a decree has been made between landlord and tenant to whom (and not "to which") the provisions of the Act are applicable. It would be sufficient to refer to the case of *Narendra Chandra Lahiri v. Afifannessa Bibi* (3).

It is worthy of note that in that case it was strenuously contended on behalf of the judgment-debtor that as a decree obtained by the cosharer landlord against his tenant was not a rent decree, Art. 6 would not be applicable. That argument was negatived by the learned Judges who heard that case. Precisely the same argument has been advanced by Mr. Gangadhar Das in this Court and, in my opinion it makes no difference that in the case before us the suit is between landlord and cosharer tenant. The cosharer tenant is a tenant, the suit is between a landlord and tenant to

(1) [1917] 37 I. C. 913.

(2) [1912] 17 I. C. 207.

(3) [1915] 27 I. C. 729.

whom in my opinion the provisions of this Act are applicable, the decree is not a decree for a sum of money exceeding Rs. 500. All the conditions necessary for the application of Art. 6 are satisfied and in my judgment the application presented on 15th April 1918 would be governed by Art. 6. I come to the conclusion that the application for execution presented on 15th April 1918, having been presented three years after the date of the decree, is barred by the provisions of Art. 6, Sch. 3, Ben. Ten. Act. I would, therefore dismiss this appeal with costs, which I would assess at two gold mohurs.

Atkinson, J.—I entirely concur in the judgment delivered by my learned brother.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 129

ATKINSON AND DAS, JJ.

Udai Chand—Plaintiff—Appellant.

v.

Nagina Singh and others—Defendants—Respondents.

Appeals Nos. 1168 to 1171 of 1917, Decided on 19th February 1919, from appellate decrees of Dist. Judge, Shahabad, D/- 28th August 1917.

Transfer of Property Act (1882), S. 61—Usufructuary mortgagee obtaining subsequent simple mortgage—He can sue for sale on simple mortgage.

A person having a usufructuary mortgage and a subsequent simple mortgage on the same property can maintain a suit for sale of the property on the basis of his simple mortgage subject to his prior usufructuary mortgage. [P 129 C 2 P 130 C 1]

Hasan Imam, Sushil M. Mullick and N. N. Sen—for Appellant.

Parmeshwar Dayal—for Respondents.

Judgment.—These four second appeals come before us from a decision of the District Judge of Shahabad, dated 28th August 1917. The cases are all analogous; and the same decision governs these four appeals. The point for decision is a very simple one. The suit was instituted by the plaintiff on a simple mortgage bond to recover the amount due on foot thereof for principal and interest; the mortgage-bond, on which the suit was based was a bond dated 25th September 1902. Prior to the execution of this bond, the plaintiff was usufructuary mortgagee in possession of the property mortgaged by the simple mortgage bond in September 1902, under the prior usu-

fructuary mortgage of 14th August 1896. The learned Judge on appeal held, confirming the first Court's decision, that the plaintiff was not entitled to sue on foot of his simple mortgage bond of 25th September 1902 by reason of the fact that there was in existence the prior usufructuary mortgage of 14th August 1896; and that consequently the plaintiff's suit was not maintainable in point of law. Upon this point the learned Judge disposed of the case and dismissed the plaintiff's suit, without considering the other issues arising for determination. The conclusion of law at which the learned Judge arrived was in our opinion clearly wrong; and he bases his decision upon the case reported as *Bhagwan Das v. Bhawani* (1), which was founded on an earlier case in the same High Court reported as *Mata Din Kasodhan v. Kazim Husain* (2). Both these rulings have been overruled and dissented from by the latter Full Bench decision reported as *Ram Shankar Lal v. Ganesh Prasad* (3), so that the decision upon which the learned Judge based the conclusion of law at which he arrived has been overruled and can no longer be relied upon as a right or correct interpretation of the law applicable to the facts of this case.

But if the learned Judge had carefully perused the existing Code of Civil Procedure, he would have found that whatever doubts may have existed at the time that the decisions reported as *Mata Din Kasodhan v. Kazim Husain* (2) and *Bhagwan Das v. Bhawani* (1) were decided, have been completely overruled and set at rest by the express phraseology of O. 34, R. 1, of the existing Code of Civil Procedure. But apart from the consideration as to the express wording of the existing Civil Procedure Code, there is ample authority in this connexion to show that such a suit as the present one is maintainable notwithstanding the fact of the existence of a prior usufructuary mortgage. A case will be found reported as *Radhakrishna Iyer v. Muthuswamy Sholagan* (4), in which it was held that a person having a usufructuary and two subsequent simple mortgages on the same property is entitled in a suit on the two later mortgages to a decree for sale of

(1) [1903] 26 All. 14.

(2) [1891] 13 All. 432. (F.B.).

(3) [1907] 29 All. 385. (F.B.)

(4) [1908] 31 Mad. 530.

the property subject to the prior usufructuary mortgage. The same point was considered in this Court by the late Chamier, C. J., and Roe, J., sitting as a Division Bench of this Court, and in unmistakeable terms their Lordships laid down what must be regarded as accepted law that a puisne mortgagee can maintain a suit on foot of his mortgage notwithstanding the existence of a prior mortgage.

Clearly the learned Judge was wrong in point of law in this case and we must allow these second appeals. The appeals are all analogous in their facts, save and except that the mortgagors are different and the properties mortgaged are different. But the dates of the respective mortgages are all the same. Therefore we will set aside the learned appellate Court's decision in these four appeals and remand these cases to the lower appellate Court for disposal upon the merits. The appeals are accordingly allowed in all cases; but only one set of costs will be awarded, namely in Second Appeal No. 1168 of 1917.

V.S./R.K.

Appeals allowed.

A. I. R. 1919 Patna 130

JWALA PRASAD, J.

Mt. Bhagjogin and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 425 of 1917, Decided on 7th December 1917, from order of Dist. Magistrate, First Class, Sassaram, D/- 22nd October 1917.

Criminal P. C., (1898), Ss. 145 and 146—Neither of parties found to be in possession—Person in actual possession not claiming—Property should be attached.

Where in a proceeding under S. 145, Criminal P. C., the Magistrate finds neither the first party nor the second party in possession but finds that actual possession is with a person who does not claim to be in possession, he should proceed to attach the property under S. 146 of the Code, as he is unable to find out which of the contending parties is in possession.

[P 131 C 1]

Athar Hossain—for Petitioners.

Judgment.—The land in dispute admittedly belongs to one Mt. Sonpi, who is one of the first party numbered 1. The subject-matter of dispute is 68 bighas of land situate in three villages, namely, Dilliakoath, Gangti and Dhango. The second party claim possession of the entire 68 bighas by virtue of a deed of gift

said to have been executed in favour of Mt. Bhagjogin, one of the members of the second party, by one Mt. Sonpi. Nos. 2 to 10 of the first party claim to be in possession of about 46 bighas of land out of the aforesaid 68 bighas by virtue of a usufructuary mortgage given to them by Mt. Sonpi. This mortgage is said to have been given only last year after the deed of gift set up by the second party. As there was a dispute as to the possession of the property and a likelihood of a breach of the peace as reported by the police, the Magistrate drew up proceedings under S. 145. The details of the plot numbers of the lands in dispute have been given in the proceedings. Mt. Sonpi filed a written statement. In this written statement she said that she had all along been in possession of the lands, that she never parted with the possession of the same, and that in Asar 1324 she gave a rehan of some of her lands to the other members of the first party, Nos. 2 to 10. To the written statement she attached a schedule of the lands in her khas possession. The Magistrate, in trying to find out who was in possession of the property in dispute held that neither the first party Nos. 2 to 10 nor the second party were in possession of the property. He, however came to the conclusion that Mt. Sonpi was admitted to be in possession of the property up to June 1916 and that at the time of the institution of the proceedings she had been in possession. He accordingly declared the possession of Mt. Sonpi and rejected the claim to possession of the other members of the first party Nos. 2 to 10, namely the mortgagees, and also of the second party.

The second party has now moved this Court against the above order of the Magistrate. The petition is opposed by Mt. Sonpi: the mortgagees do not seem to appear in this Court. The main contention of the second party has been that the order of the Magistrate declaring Mt. Sonpi to be in possession of the lands in dispute is illegal, inasmuch as in her written statement she did not claim to be in possession, at least in respect of about 46 bighas of land, which she said it was mortgaged to the first party Nos. 2 to 10 and was not in her possession. She was therefore it is contended not interested in the dispute under S. 145 and was not entitled to a declaration in her

favour. The dispute, according to the learned Counsel for the petitioners, was in respect of 46 bighas between the mortgagees and the members of the second party, said to be the donees of Mt. Sonpi. As shown above about 20 bighas over and above the mortgaged lands was also in dispute. The details of this have been given in the petition of Mt. Sonpi. She asserted her claim over these lands and she said that she had been in possession thereof. She therefore was entitled to a declaration by the Magistrate in her favour, the Magistrate holding that her possession was proved. The order of the Magistrate, so far as the land specified in the written statement of Mt. Sonpi is concerned, is valid and is not at all without jurisdiction. The question then arises as to the rent of the lands which are said to have been mortgaged. Mt. Sonpi herself does not claim to be in direct possession of these lands; she said that her mortgagees were in possession since last year.

As to the actual possession, therefore the dispute was between the mortgagees Nos. 2 to 10 of the first party and the members of the second party. It appears to me that the Magistrate was not entitled under S. 145 to declare Mt. Sonpi to be in possession when she herself did not claim to be in possession. The Magistrate has held that both the mortgagees, members of the first party, and the second party have failed to prove their possession of this property. The proper order therefore for the Magistrate to pass was to attach the property under S. 146, as he was unable to find out which of the contending parties was in possession. Mt. Sonpi cannot be regarded to be a contending party so far as the mortgaged properties are concerned. This order can as well be passed by the High Court in revision, vide *Kotrai Jherriah Coal Co. Ltd. v. Sibkrishta Daw & Co* (1). In terms of that authority I would set aside the order of the Magistrate so far as it relates to the mortgaged property and would direct the Magistrate to attach the same under S. 146, Criminal P. C. The lands mentioned in the proceedings minus the lands mentioned in the written statement of Mt. Sonpi would be attached. The numbers of the plots have been given both in the proceedings as well as in the written

(1) [1895] 22 Cal. 297.

statement of Mt. Sonpi. The above view is also supported by an earlier authority in the case of *Reid v. Richardson* (2). The order of the Magistrate under S. 145 is therefore set aside so far as the plots mentioned above are concerned and the order as regards the rest of the property claimed by Mt. Sonpi in her written statement is maintained.

V.S./R.K.

Order set aside.

(2) [1887] 14 Cal. 361.

A. I. R. 1919 Patna 131

DAWSON-MILLER, C. J. AND
MULLICK, J.

Rāgho Pahan—Decree-holder — Petitioner.

v.

Mt. Lachan Koer—Claimant — Opposite Party.

Civil Revn. No. 73 of 1918, Decided on 4th December 1918, from decision of Judicial Commissioner, Ranchi.

Civil P. C. (5 of 1908), O. 21, R. 58—Mortgage decree—Sale of mortgaged property—Objection to sale cannot be entertained.

Order 21, R. 58, Civil P. C., can only apply to cases where property has been attached in execution of a decree. It has no application to cases where mortgaged property is ordered to be sold in satisfaction of the mortgage decree by the terms of the decree itself. [P 131 C 2]

Atul Krishna Roy—for Petitioner.

Achalendra Nath Das—for Opposite Party.

Dawson-Miller, C. J.—In my opinion this order cannot stand. In the first place, the learned Munsif was wrong in allowing in the present case a claim under O. 21, R. 58, and secondly, the learned Judicial Commissioner was not justified in upholding the Munsif's judgment on the grounds stated. Now it has been held in the High Courts of Calcutta, Bombay and Allahabad, if not in others, that O. 21, R. 58, could only apply to cases where there has been property attached in execution of a decree. In the present case the property was mortgaged property and it was not attached in execution of a decree but was ordered to be sold in satisfaction of the mortgage decree by the terms of the decree itself. Therefore the interpretation of O. 21, R. 58, was misconceived by the learned Munsif.

In my opinion therefore the order of the Judicial Commissioner and that of the Munsif having been made without jurisdiction, ought to be set aside. The

applicant will have his costs before this Court. Hearing fee one gold mohur.

Mullick, J.—I agree.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 132

JWALA PRASAD, J.

Udit Narayan Lal—Petitioner.

v.

Sunderman Jha—Opposite Party.

Criminal Revn. No. 323 of 1917, Decided on 6th December 1917, from order of Magistrate, Purneah, D/- 13th July 1917.

Criminal P. C. (1898), S. 145—Mere rejection of evidence does not vitiate proceedings unless evidence rejected is very material document.

Mere rejection of evidence does not vitiate proceedings under S. 145. It depends upon the circumstances in each case whether the rejection of evidence would be tantamount to a refusal to exercise proper jurisdiction. If the evidence rejected is a very material document affecting possession of a party, its rejection might furnish a good ground of grievance to that party.
[P 132 C 2, P 133 C 1]

G. C. Pal—for Petitioner.

Govt. Advocate and *Akbari*—for Opposite Party.

Judgment.—This application relates to an order of the Magistrate of Purneah, dated 13th July 1917 declaring that the second party be maintained in possession of the subject-matter of dispute. The first party is the applicant. The only ground urged in support of the application is that the learned Magistrate was wrong in rejecting a judgment of the Calcutta High Court, dated 29th July 1915 in which the predecessors-in-interest of both parties were parties. The judgment in question was rejected by the Magistrate, as in his opinion it was irrelevant to the case. He has discussed in detail the reason for not admitting the judgment in evidence in his order of 13th July 1917. The present dispute related to khewat No. 22. The Magistrate says that the judgment of the High Court related to khewats Nos. 77 and 18. My attention was drawn to the judgment itself which was read over to me. It appears that about 4,000 acres of land were concerned in the litigation which went up to the High Court in respect of which the decision of the High Court was given. The above land is mentioned in the judgment to be comprised in khewats Nos. 77 and 18. The High Court held that they were not exempted from the

sale of the Samapur factory to the master of the first party. The sale deed has been filed in this case and it has been used in evidence. The Magistrate has discussed the sale deed with regard to the question of the title of the first party to khewat No. 22 which was in dispute before him, and he has held that there was nothing to show in the sale deed that the land in question was actually covered by it.

The judgment of the High Court also deals principally with the construction and interpretation of the sale deed as to whether the subject-matter of the litigation, namely, the khewats Nos. 77 and 18 were comprised in the sale deed or not. Thus both the sale deed and the High Court judgment stand on the same footing. In the opinion of the Magistrate both of them do not relate to the land in suit and do not prove the title of the first party petitioner. Be that as it may the fact remains that the Magistrate did consider the document at the time of rejecting it. He no doubt formally rejected the document in the order-sheet of 4th July, that is, prior to his final order or judgment of 13th July. In that case there was no necessity of referring to it again in the judgment. But he has devoted a good deal of discussion in the final order of 13th July upon this document, and I should say equal (if not more) consideration has been given to the High Court judgment as well as to the sale deed. To my mind the document was considered by the Magistrate; and I do not know why he formally recorded the order rejecting the document. It would have been well to have admitted this document in evidence in the same way as he had admitted the sale deed. Both are alleged to relate to the title of the first party; whether the title was or was not actually proved by this document is another question. The rejection of the document appears to me in this case to be purely formal and not quite justifiable. The objection now in the present application by the first party equally appears to me to be formal. I do not think that there has been such an irregularity in rejecting the document as to affect the jurisdiction of the Magistrate regarding the inquiry under Cl. (4), S. 145. It depends upon the circumstances in each case whether the rejection of evidence would be tantamount to

a refusal to exercise proper jurisdiction. If it was a very material document affecting the possession of the first party, he might have a good grievance. The document related to the title which according to him was to be proved by this document, but Cl. 4, S. 145 forbids the Magistrate to go into the question of right or title to the subject-matter but restricts him to the consideration of possession. Evidence of title no doubt to some extent would be permissible and might be considered necessary in the circumstances of a particular case in order to understand the question of possession. Cl. 4, S. 145 is clear. The Magistrate is to peruse the statements, hear the parties, and receive evidence in order to find out possession : " without reference to the merits and claims of any party to a right to possess the subject-matter of dispute."

The document in question is a judgment of the High Court of 1915. The dispute as to possession arose in 1917. The Magistrate had to find out possession at the time when the dispute arose. The judgment of 1915, even if it related, of which there is no certainty, to the subject-matter in dispute, would not have been of very great assistance to the Magistrate. The judgment itself does not specifically relate to khewat No. 22 but it relates only to khewats Nos. 77 and 18. I do not want to discuss whether the judgment by implication included khewat No. 22 or not, but on the face of it No. 22 is not mentioned in it. It was from that point of view not very relevant for the purpose of the inquiry that the Magistrate had in his hand. The Magistrate has, upon the oral and documentary evidence as regards possession, come to the conclusion that the second party was in possession. It was held in the case of *Keshab Chunder Roy v. Akhil Metey* (1) that the mere rejection of evidence does not vitiate proceedings under S. 145, Criminal P. C. There has been no error in the procedure or any defect in the jurisdiction of the Magistrate. The application therefore should be rejected.

I would like at the same time to point out that the order-sheet of the Magistrate of 5th July 1917 does not appear to me to show a very desirable attitude of the Magistrate against the legal representatives of the first party. On 4th July he declined to allow the Mukhtear of the

first party to appear in the case owing to some objectionable behaviour on the last hearing. On 5th July he commented upon the action of the Pleader who appeared in the case to press for the admission of the judgment of the High Court. And the Magistrate in the case of the Pleader also passed the following remarks :

" A petition is put in by a Pleader for the first party, who persists in filing a copy of a judgment though this Court has ruled that the judgment is irrelevant to this case and cannot be admitted in evidence. It was exactly this disregard of the ruling of the Court and defiance of its orders in every matter which was overruled that caused the Court to debar the Mukhtear from appearing in the case, and I am surprised at a Pleader now adopting the same procedure. I will see what action should be taken, I again disallow admission of the document."

The Magistrate himself persisted in using the document in his final judgment or order of 13th July, notwithstanding his having rejected it on 5th July. If the Pleader believed that the document was relevant to show his title, there was nothing objectionable on his part to insist upon having the document taken in. The previous order-sheet of the case does not show that the document was rejected by him formally. Again in the judgment of 13th July, towards the end, the Magistrate concludes by severe strictures against the first party Udit Narayan for his having tried to claim possession over this land in khewat No. 22. He is the servant of his master who lives at Benares and it was believed by him and by his master that the land in dispute was included in the sale deed whereby the factory was sold to him. As a matter of fact the second party raised similar kinds of disputes with regard to khewats No. 77 and 18 though not expressly mentioned in the sale deed and the first party succeeded in having held it by the High Court that khewats Nos. 77 and 18 were not excluded from it. The previous litigation between the parties does not justify the remarks of the Magistrate against the first party. The application to this Court is rejected for the reasons already given.

V.S./R.K.

Application rejected.

(1) [1895] 22 Cal. 998.

A. I. R. 1919 Patna 134 (1)

ROE AND COUTTS, JJ.

Ras Behari Singh—Appellant.

v.

Juman Lal and others—Respondents.

Second Appeal No. 1338 of 1918, Decided on 25th March 1919, from a decision of Dist. Judge., Monghyr.

Limitation Act (1908), Art. 181—Mortgage—Preliminary decree—Application for decree absolute—Limitation begins to run only after expiration of period of grace.

The right to apply for a decree absolute in a mortgage suit does not accrue until the period of grace given in the preliminary decree has expired and, therefore, limitation does not begin to run till the expiration of that period. [P 134 C 1]

Rai Guru Saran Prasad—for Appellant.

Ram Pershad and Kulwant Sahai—for Respondents.

Roe, J.—The point for decision in this case is whether in cases falling within Art. 181 of the Schedule to the Limitation Act the date upon which the right to apply accrues in the case of an application to convert a preliminary mortgage decree into a decree absolute is the date of the decree itself or the date upon which the period of grace expires. It is now settled law that such applications do fall within the Article in question but in none of the reported cases decided by the Privy Council, that is to say, *Munna Lai Parruck v. Sarat Chunder Mukerjee* (1), *Batuk Nath v. Munni Dei* (2) and *Abdul Majid v. Jawahir Lal* (3) was the question in issue the date from which limitation should run. Nor was this question in issue in a reported decision of this Court in *Bala Ram Naik v. Kanhai Bharan Mahapatra* (4). The matter was considered and decided in *Madho Ram v. Nihal Singh* (5) and Banerji, J., held that the right to apply for a decree absolute did not accrue until the period of grace had expired. With this view I am entirely in agreement. This seems to me the only logical interpretation of the meaning of the words of the Article. The decree-holder could not apply for a decree absolute until the contingency upon which the decree absolute could be made had been fulfilled.

That contingency was that the money due on the mortgage should not have been paid before a certain date and, if that money had been paid at any time prior to the dates fixed in the preliminary decree, the decree-holder would have no right to enforce his decree. Until all possibility of that contingency had expired, it seems to me that no right lay in the decree-holder on which he could make the application which he has now made. It is common ground that the application for the making of the decree absolute was not out of time, if that time be reckoned from the last day of the period of grace. I would therefore decree this appeal, restore the order of the first Court, and set aside the order of the District Court with costs in all Courts.

Coutts, J.—I agree.

V.S./R.K.

*Appeal allowed.***A. I. R. 1919 Patna 134 (2)**

JWALA PRASAD, J.

Jagdeo Singh—Plaintiff—Appellant,

v.

Ajodhya Singh and others—Defendants—Respondents.

Second Appeal Nos. 748 and 750 of 1916, Decided on 12th December 1916, from decision of Dist. Judge, Darbhanga

Limitation Act (1908), Arts. 95 and 144—Fraud—Suit for possession on ground that decree under which plaintiff was dispossessed was obtained by fraud is governed by Art. 95 and not by Art. 144.

A suit for recovery of possession of immovable property, on the ground that the decree on the basis of which the defendants dispossessed the plaintiff was obtained by fraud is governed by Art. 95 and not by Art. 144, Sch. 1, Lim. Act.

[P 135 C 2]

Chandra Shekar Banerji—for Appellant.

G. D. Singh—for Respondents.

Judgment—The appellant was the plaintiff in both the appeals. He took bhurna (usufructuary mortgage) of certain kasht lands from defendants second party respondents. The defendant first party respondent, Jurdeo Singh, brought a suit for recovery of possession of the land against the plaintiff on the ground that the tenant defendant second parties, respondents had abandoned their holdings and that the plaintiff was a mere trespasser. The suit was decreed ex parte on 20th December 1911, and in the execution of the decree a writ for deli-

(1) A. I. R. 1914 P. C. 150=42 Cal. 775=42 I. A. 88=27 I. C. 683 (P. C.).

(2) A. I. R. 1914 P. C. 65=36 All. 284=41 I. A. 104=23 I. C. 644 (P. C.).

(3) A. I. R. 1914 P. C. 66=36 All. 350=23 I. C. 649 (P. C.).

(4) [1917] 1 Pat. L. J. 364=38 I. C. 385.

(5) [1915] 38 All. 21=30 I. C. 494.

very of possession was issued in favour of the defendant first party. The plaintiff then applied for a re-hearing of the suits under O. 9, R. 13, and the suits were fixed for re-hearing for 20th December 1911. On that date the plaintiff made an application for time. His application was rejected, and the suits were then decreed *ex parte*. The plaintiff again made attempts to have the decrees set aside, but failed both in the First Court and in the Court of appeal. On 9th February 1912 the defendant first party, Ajodhya Singh, respondent, obtained delivery of possession of the lands in suit in execution of the said *ex parte* decrees in his favour. The plaintiff-appellant then brought the suits, out of which the present appeals have arisen in the Court of the Munsif of Samastipur, for recovery of possession of the lands in suit on the allegation that the *ex parte* decrees which were obtained by the respondent first party on the basis of which the appellant in this case was dispossessed from his lands were fraudulent, inasmuch as there had been no abandonment of the holdings of the defendant second parties respondents, and also because the malik had recognised the plaintiff as transferee by accepting rent from him, and that nothing was due to the defendant-respondent, first party, as rent of the land in suit.

The relief sought in the plaint is that a decree may be passed awarding khas possession to the plaintiff over the lands in suit by dispossessing the defendant first party on the ground that the defendant first party obtained no right to the lands on the basis of the decree fraudulently obtained by him or that of the delivery of possession. The cause of action is alleged to have accrued to the plaintiff on the date of the decrees, and on the date of delivery of possession to the respondent first party and the appellant's dispossession from the land. Both the Courts below have dismissed the suits brought by the appellants, holding that the suits were barred by time under Art. 95, Sch. 1, Lim. Act, on the ground that they were brought more than three years from the date of the alleged knowledge of the fraud. The appellant contends that as the suits are for recovery of immovable property the ordinary 12 years' rule laid down in Art. 144, Lim. Act applies, and that Art. 95, Lim. Act

does not apply to these suits. I agree with the views of the Courts below that the suit is governed by Art. 95. Although the suits are for recovery of possession, they are virtually suits to set aside the *ex parte* decrees and the sales held in execution of civil Court decrees, for which one year is prescribed. Art. 95 would extend that time to three years if the decrees were obtained by fraud. It is clear that the relief claimed in the plaint involves necessarily the setting aside of the decrees.

The allegation of fraud in the present case is the essence and substance of the claim of the plaintiff, and is the basis of the relief sought. Even if the suits are not specifically to set aside the civil Court decrees, the relief is based on the ground of fraud and will come under Cl. 2, Art. 95, namely, "other relief on the ground of fraud." The "other relief" referred to in Cl. 2 of the Article need not be of the same kind, "as setting aside a decree obtained by fraud," and the Article is not limited to specific relief on the ground of fraud. The expression "other relief" is comprehensive enough to include the present suit based entirely on fraud caused by the defendant in obtaining the decree whereby the plaintiff was dispossessed. The plaintiff in this case was a party to the decree which were obtained against him and he had been dispossessed in execution of the decrees which are binding upon him. He exhausted all the remedies available to him to set aside the decrees and he failed throughout, up to the Court of Appeal. The present suit brought by him is a machination on his part to have the decrees, and the possession given to the decree-holder in execution of those decrees, set aside and rendered ineffective. The fraud alleged in this case is not merely a part of the machinery by which the first party respondent has kept the plaintiff out of possession. I therefore hold that Art. 95, Lim. Act applies, and not Art. 144 as is urged on behalf of the appellant. The result is that I agree with the views of the Courts below and I dismiss the appeals with costs.

V.S./R.K.

Appeals dismissed.

* A. I. R. 1919 Patna 136 (1)

JWALA PRASAD, J.

Dhanai Mahto and another — Defendants—Appellants.

v.

Rambirich Rai—Plaintiff — Respondent.

Secnd Appeal No. 259 of 1917, Decided on 28th February 1918, from decision of Sub-Judge, Saran, D/- 11th January 1917.

* Registration Act (1908), S. 50 — Registered document tainted with fraud—Priority of registration cannot be claimed.

Section 50 has no application in cases where the registered deed is tainted with fraud and the party holding the registered deed has no claim to priority by virtue of the section the object of which is to put an end to fraud. [P 136 C 2]

Nirsu Narayan Sinha—for Appellants.*Bimala Charan Sinha*—for Respondent.

Judgment.—This appeal must fail. It arises out of a suit for specific performance of a contract of *zarpeshgi* said to have been entered into by defendant 4 with the plaintiff on 15th December 1914, and for a declaration that the usufructuary mortgage bond executed by defendant 4 in favour of defendant 1, dated 8th January 1915 was collusive and for confirmation of possession of 3 bighas 12 cottahs 15 dhurs of land agreed to be given in *zarpeshgi* to the plaintiff.

The Court below has found as a fact that defendant 4 did contract with the plaintiff to execute the mortgage bond in terms mentioned in the plaint. It has also been found as a fact that the mortgage bond executed in favour of defendant 1 was collusive and without any consideration. Upon the above findings the Court below has decreed the plaintiff's suit in toto and has also declared that the *zarpeshgi* deed in favour of defendant 1 shall have no priority over the bond to be executed in favour of the plaintiff.

The learned vakil for the appellants does not contest the findings of fact and cannot do so in second appeal. He simply urged that the lower Court was wrong in declaring that the bond to be executed in favour of the plaintiff shall have priority over the deed already executed in favour of defendant 1, inasmuch as the document in favour of the defendant being a registered one has under S. 50, Registration Act of 1908, priority over the unregistered or oral agreement

in favour of the plaintiff. This contention has no force in it, in view of the fact that the Court has held that the bond in favour of defendant 1 was collusive and tainted with fraud. S. 50 has no application in cases where the registered bond is tainted with fraud and the party holding the registered deed has no claim to priority by virtue of this section the object of which is to put an end to fraud. The authorities on this point are too numerous and the principle of law as well known.

The appeal is therefore dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 136 (2)

MULLICK AND JWALA PRASAD, JJ.

Elahi Bux—Appellant.

v.

Nawab Lall—Respondent.

Appeal No. 208 of 1918, Decided on 17th January 1919, from appellate order of Dist. Judge, Patna, D/- 24th April 1918.

Civil P. C. (1908), O. 21, R. 2—Payment by judgment-debtor—Decree-holder can certify at any time—Notice to judgment-debtor is not necessary—Decree-holder can certify in his application for execution.

Order 21, R. 2, does not prescribe that any notice shall be served upon the judgment-debtor by the decree-holder before the latter can certify a payment towards the satisfaction of the decree. A decree-holder can certify a payment at any time after it is made.

It is open to a decree-holder to certify a payment in his application for execution.

[P 137 C 1]

P. K. Sen—for Appellant.*Murari Prasad*—for Respondent.

Judgment.—This miscellaneous appeal arises out of the execution of an instalment decree, which was to the effect that a sum of Rs. 134-4-0 was payable by the judgment-debtor to the decree-holder on each of the following dates: 11th October 1913, 11th April 1914, 11th October 1914 and 11th April 1915. The decree-holder alleges that the first two instalments were duly paid, and he applied on 27th September 1917 for execution of the balance of the decree on the ground that the third instalment, which fell due on 11th October 1914, not having been paid, the whole balance of the decree according to the terms of the decree itself became due on that date. The judgment-debtor denied payment of the instalment which was due on 11th April 1914 and pleaded that the execution was barred

The lower appellate Court found as a fact that the second instalment was paid on 11th April 1914 and he held that as the third instalment became due on 12th October 1914 and the default complained of took place on that date, the present application having been made on 27th September 1917, that is to say, within three years of 11th October 1914, the decree-holder was competent to proceed with the execution.

On behalf of the judgment-debtor appellant before us, it is contended that the Court was precluded from going into the plea of payment set up by the decree-holder in respect of the second instalment. The learned counsel who appears for the appellant concedes that it is open to the decree-holder to certify payment within the meaning of O. 21, R. 2, Civil P. C., in his application for execution; but he contends that that certificate must be made within three years of the alleged payment or adjustment, and that, as in the present case, the certificate was made more than three years from the date of the alleged payment, viz., 11th April 1914, the Court is precluded by sub-Cl. (3), R. 2, from taking evidence upon the point. Now it is quite clear that under O. 21, R. 2, if a judgment-debtor pleads payment or adjustment he must issue notice upon the decree-holder before he can certify payment within the meaning of the rule, and that if he fails to certify he cannot afterwards ask the Court to go into evidence in respect of that payment. Under Art. 174, Lim. Act, the period within which notice must be served upon the decree-holder by the judgment-debtor is 90 days of the date of adjustment or payment, and if the judgment-debtor exceeds this period then he cannot be permitted to adduce evidence in support of the plea of payment. But there is no corresponding disability imposed by the Limitation Act upon the decree-holder; the rule does not prescribe that any notice shall be served upon the judgment-debtor by the decree-holder. He may certify the payment at any time. But it is contended by the learned counsel that this certificate must be within three years of the alleged date of payment or adjustment.

The reply to this is that there is no provision in law to this effect, and, there being no prescribed period limited, it seems that it is open to the decree-holder

to make the certificate at any time after the alleged payment. The learned counsel replies to this that if this is the law, then it is inconsistent with the provisions of sub-Cl. (7), Art. 182, Lim. Act; but we are unable to see that this is the case. Art. 182, as applied to the present case, only means that the decree-holder shall make his application for execution within three years from the date upon which the instalment became due, viz., the third instalment. He is within three years of that date, and therefore he has fulfilled the conditions of sub-Cl. (7). There is no other provision of law which, so far as we can see, prevents him from proceeding with the execution. If the alleged payment was in fact made on 11th April 1914, it is immaterial that the attempt to certify the same is more than three years from that date.

Of course it is a question of fact whether the payment was made or not on that date. The mere allegation of the decree-holder is not conclusive. It is open to the judgment-debtor to deny that the payment was made on that date, and if he can show that the allegation of payment on that date is false, then obviously no certificate can be made in respect of that payment, and sub-Cl. (3), R. 2, is a bar to the competency of the execution. But in every such case it must be determined upon the evidence whether or not the payment set up by the decree-holder was in fact made. In this case there is a finding of fact, which is conclusive and binding upon us, to the effect that the payment set up by the decree-holder was in fact made as alleged on 11th April. The case of *Tukaram v. Babaji* (1) is clear authority in support of the view which we have taken. The learned counsel has relied upon the case of *Chhattar Singh v. Amir Singh* (2), but that case does not bear upon the precise question before us, and, so far as we can see, no direct authority has been shown to us which is opposed to the view which we are now taking. In these circumstances the appeal will be dismissed with costs.

V.S./R.K.

Appeal dismissed.

(1) [1897] 21 Bom. 122.

(2) [1916] 38 All. 204=32 I. C. 590.

A. I. R. 1919 Patna 138

JWALA PRASAD, J.

Sattogopal Sah and another—Accused—Petitioners.

v.

Jago Chamar—Opposite Party.

Criminal Revn. No. 410 of 1917, Decided on 10th December 1917, from an order of Sub-Divl. Magistrate, Giridih.

Penal Code (1860), S. 425—Accused making breach in bank of complainant's field through fear of overflow of surplus water—No intention to cause damage—Still accused is guilty.

Accused fearing that the water in his tank would overflow caused a breach in the bank of the complainant's field with the result that the surplus water from the tank overflowed into the field. It was found that there were no crops in the field so that apart from the damage done to the bank no other damage was caused to the complainant:

Held: that the accused was guilty of the offence of mischief. [P 138 C 2]

Bankin Chandra Dey—for Petitioners.

Judgment. — The petitioners have been convicted by the Subdivisional Magistrate of Giridih under S. 426, I. P. C. and sentenced to a fine of Rs. 25 each. The case for the prosecution as stated by the Magistrate is that the complainant's field is near the tank of the petitioners with a channel between and that the accused on the day of the occurrence

"through fear that the tank would overflow, blocked up the channel at the point where it emptied itself into the tank and at the same time cut a breach in the Al of the complainant's field,"

the result of which was that the water rushed into the field of the complainant and damaged it. Mr. Hollow, Sub-Deputy Magistrate, was examined as a witness in the case. He inspected the locality and found that the breach in the Al between the complainant's field and the channel was made but he did not find any paddy seedlings in the field, on the other hand he found that the field in question was parti. The Magistrate himself does not find that any seedling existed on the field of the complainant, nor does he find that any damage was done to the field. He however has convicted the accused as he holds that:

"the cutting of the Al is itself a mischief whether the rush of water damaged the paddy seedlings or not."

Thus upon the finding of the Magistrate and the evidence in the case no seedling was in the field of the complainant and no damage was done to the field.

And further that the intention of the accused was not to cause any damage but was with a view that the water of his tank might flow out. Technically speaking, the act of the accused was a mischief within the definition of S. 425, I. P. C. as having been done with a motive to free his tank from water, and that the intention was to make a breach in the Al of the complainant's field in order to effect that motive. There can therefore be no question that the act was done with the intention and with knowledge that the water would overflow into the land of the complainant and further that the Al was to some extent damaged by causing a breach in the same. I am supported in my view by the authorities quoted in *Deputy Superintendent and Remembrancer of Legal Affairs v. Chulhan Ahir* (1) and *In re Ram Golam Singh* (2).

There cannot be any manner of doubt that the cutting of or causing the breach in the Al itself diminished the utility of the same for holding in or for keeping out water from the field as is contemplated in S. 425, I. P. C. and it fully satisfies the requirements of the section. I therefore agree with the view of the Subdivisional Magistrate that mischief was committed by the petitioners. The question then is as to the punishment to be given. The Magistrate awards a high punishment for the reason recorded by him, namely, that the act of the accused was extremely high-handed and deserves rather severe punishment. No sufficient reason is given for calling the act of the accused as high-handed: on the other hand it has been held that there was necessity of freeing the petitioner's tank of the water that was collecting into it. The accused reported five or six days before the occurrence to Mr. Ward about the urgency of emptying this tank. He suggested to Mr. Ward that the water might be discharged through the culvert of Mr. Ward. Mr. Ward objected to that and the complainant then said that he had got only two alternatives, either to let the water pass through the culvert of Mr. Ward or to cut the Al of the complainant's field. So it appears that the accused was compelled by necessity to cut the Al. He does not appear to have had any recourse to force or

(1) [1912] 13 I. O. 826.

(2) [1866] 6 W. R. Cr. 59.

violence, nor to have the intention of causing damage to the complainant's field. There was therefore no high-handedness on his part in making the breach particularly when there was no crop on the complainant's field. The damage done by the breach to the A1 must have been very insignificant. The Magistrate does not say it was very much. The punishment of Rs. 50 fine in all at the rate of Rs. 25 against each of the two accused appears to me to be excessive. I therefore reduce the sentence to a fine of Rs. 10 each. The balance of the fine if paid must be refunded.

v. S./R.K. *Sentence reduced.*

A. I. R. 1919 Patna 139 (1)

DAS, J.

Nathu Thakur Marwari and others—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 199 of 1919, Decided on 14th July 1919.

Criminal P. C. (5 of 1898), S. 239—Joint trial of person keeping gaming house and of persons gambling is not illegal as both form part of same transaction—Bengal Public Gambling Act (2 of 1867), Ss. 3 and 4.

Where it is found that a person has opened, kept or used his house as a common gaming house for profit, and that other persons have used that house for the purpose of gambling and have paid charges for the same, a joint trial of all such persons for offences under Ss. 3 and 4, Bengal Public Gambling Act, is not illegal, as the offences are committed in the same transaction within the meaning of S. 239, Criminal P.C. [P 139 C 1, 2]

Abani Bhushan Mukherji — for Petitioners.

Judgment. — Two points have been urged before me, first, that the judgment of the appellate Court is not in accordance with law, and secondly, that the joint trial of the petitioners was illegal. On the first point I am unable to agree with the learned vakil that the judgment is not in accordance with law. So far as the second point is concerned, I am of opinion that the offences of which the petitioners were charged were committed in the same transaction and that consequently the joint trial was not illegal. Nathu Thakur has been convicted under S. 3, Gambling Act (2 of 1867 B. C.) and the other accused have been convicted under S. 4 of that Act, and the argument is that the offences committed by them cannot be said to have been committed in the same transaction. Therefore the

problem for my consideration is, what is the meaning of the words "same transaction" in S. 239, Criminal P. C. In the case of *Guja Lal v. Fatteh Lal* (1), Garth, C. J., said:

"A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons."

It seems to me that there is a dealing "transacted" between Nathu Ram, who has been found to have opened, kept or used his house as a common gaming house for profit, and the other petitioners, who have used that house for the purpose of gambling and who have paid Nathu Ram his charges for the same. I am of opinion therefore that the joint trial of the petitioners was not illegal and that the application fails and must be refused.

v. S./R.K. *Application refused.*

(1) [1881] 6 Cal. 171.

A. I. R. 1919 Patna 139 (2)

JWALA PRASAD, J.

Chauth Mull—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 456 of 1917, Decided on 20th December 1917.

Bengal Municipal Act (1884), S. 251—Report of chemical examiner made before proceedings under S. 251 is not admissible without examining Chemical Examiner.

A report of the Chemical Examiner made prior to the institution of proceedings under S. 251, Bengal Municipal Act, is not admissible in evidence without the examination of the Chemical Examiner himself. [P 141 C 1]

Asghar and S. N. Sircar—for Petitioner.

Judgment.—The petitioner has been convicted by the Honorary Magistrate of Patna under S. 251, Bengal Municipal Act (Act 3 of 1884). The conviction has been affirmed by the Additional District Magistrate in appeal.

On 23rd August 1917 the Medical Registrar of Patna Municipality (P.W. 1) went to the shop of the accused and "wanted to purchase some good ghee for food purposes." The petitioner brought out some canisters of ghee and offered the ghee wanted by the Medical Registrar. The Registrar took some ghee and smelt it and found it bad and he told the petitioner that it was "unfit for human consumption" and put the ghee in 3 phials in the presence of the petitioner and some witnesses and sealed them up. Two phials of the ghee were made over to the

Health Officer of the Municipality, who was also present at the time. The Health Officer sent the phials to the Government Chemical Examiner at Gulzarbagh in Patna City. The Chemical Examiner's report was received by the Municipality. It bears the date 29th August 1917. The report stated as to the ghee sent to him, purporting to belong to Bindh Raj Sultan Mull of Ma'oofganj, that it was "adulterated and unfit for human consumption." Upon the receipt of this report sanction of the Municipality was obtained on 2nd September 1917 under S. 355, Municipal Act, for the prosecution of the petitioner under S. 251 of the Act. Thereupon the Registrar of the Municipality lodged a formal complaint in the Court of the Honorary Magistrate on 7th September 1917, enclosing with the petition the report from the Chemical Examiner, the bottles of the sample ghee and the receipt given by the accused and also the sanction given by the Chairman of the Municipality.

On behalf of the prosecution the Registrar was examined as a witness (P.W. 1). He stated in his evidence that he asked the petitioner to sell to him good ghee for food purposes and that ghee was offered to him for sale and he took some samples therefrom and made over to the Health Officer who was present there. Upon this point he says:

"I made over the two phials to the Health Officer. Ex. 1 is the signature of the Health Officer on the phial Ex. 2. What happened afterwards I don't know about these two phials. Ex. 1 is the report of the Chemical Examiner."

The Chemical Examiner's report was marked upon this evidence. The accused took objection in the trying Court as to the admissibility of the report of the Chemical Examiner under S. 510, Criminal P. C. This objection was apparently overruled. The Chemical Examiner was not examined to prove that the ghee was adulterated and unfit for human consumption. Under S. 510, Criminal P. C., the report of the Chemical Examiner may be used as evidence of enquiry without the evidence of the Chemical Examiner in cases where the report is made in the course of any proceedings under the Code of Criminal Procedure. The prosecution was started upon the complaint lodged on 7th September 1917 and the report was received about 2nd September 1917, i.e., prior to the initiation of the prosecution. The report was

therefore not made in the course of any proceeding instituted under the Code of Criminal Procedure. The examination of the Chemical Examiner cannot, therefore, be dispensed with. I therefore allow this contention of the petitioner and hold that the Chemical Examiner should have been examined.

It is also contended that identity of the ghee examined by the Chemical Examiner has not been proved in this case. The evidence on this point consists only of the evidence of the Registrar of the Municipality. He made over the ghee to the Health Officer, but he does not know what became of it afterwards until he saw the report of the Chemical Examiner. The connecting link is therefore missing. Evidence should have been given on behalf of the prosecution as to the transmission of the identical ghee to the Health Officer and of his having received it. The Health Officer got it from the Registrar and he ought to have been examined by the prosecution and given any further evidence, if any to show how the identical ghee reached the hands of the Chemical Examiner. This has not been done in this case.

It has also been said that the Chemical Examiner's report does not show the nature of the adulteration and exactly what he found by analysis, i.e., what the adulteration consisted of. The report says that the ghee was adulterated and unfit for human consumption. The objection of the defence is that the details of adulteration were necessary. In support of the contention the learned counsel on behalf of the petitioner has cited the case of *Moti Lal Pal v. Corporation of Calcutta* (1), which was a case under S. 495, Calcutta Municipal Act (3 of 1899). The terms of that section entirely agree with the terms of S. 251, Bengal Municipal Act (3 of 1884) and the principle of that ruling will apply to the present case. I do not feel inclined to agree with the contention of the learned counsel on this point. The authority cited in the case goes against the contention of the learned counsel. There the Food Inspector of the Municipality purchased samples of mustard oil from the manufactory of the accused which on analysis were found to be adulterated with til oil and the accused were convicted under S. 495, Bengal Act 3 of 1899. The

(1) [1903] 30 Cal. 643.

learned Judges who decided that case observed that the Inspector asked for mustard oil and was entitled to get mustard oil unadulterated with til or anything else, and the 'supply of the adulterated mustard oil was held sufficient to bring the vendor within the section of the Act. Here the Registrar wanted good ghee for human consumption. The meaning is clear that he wanted pure quality of ghee as is mentioned in the ruling quoted above. To give him adulterated ghee, no matter how it was adulterated, would bring the petitioner within S. 251 of the Act. The proviso to that section relied upon by the learned counsel for the petitioner does not apply to this case at all.

Another contention of the learned counsel has been that the ghee was not offered for sale and that the petitioner does not sell ghee. It is admitted that the canisters of ghee were produced from a room of his shop by the petitioner himself. It is admitted in evidence of the defence that the Registrar went to the shop and asked for ghee from the accused and the accused said that he had ghee in his possession and the ghee was given. So the demand of the ghee and the offer of it is admitted. The only question is whether the ghee was for purchase and it was offered for that purpose. The Registrar in his evidence say that he "asked the accused for ghee on price" and that the canisters of ghee were brought out by the servant of the accused and one canister was opened. The accused told him to take ghee from any one he liked. From the evidence of the Registrar there can be no doubt that he asked the accused to sell him ghee and that the ghee was given to him for that purpose. The subsequent act of the Registrar in taking the ghee as sample, after suspecting it to be adulterated, does not at all affect the decision that when he first asked the accused to give ghee he wanted to purchase it. In the ruling quoted above, the Inspector of the Municipality in a similar way took samples of the mustard oil from the accused in that case and sent them for analysis. I therefore overrule this contention of the petitioner.

The result is that I do not see any ground for setting aside the conviction in this case upon the contentions raised by the learned counsel referred to above. But the case is one which required addi-

tional evidence to be given in order to prove the adulteration of the ghee. The report of the Chemical Examiner as observed above, was not properly admissible in evidence and the Health Officer of the Municipality should have been examined and evidence should have been given as to the identity of the ghee that the Chemical Examiner analysed. I would therefore remand the case to the lower Court with the direction to examine the Health Officer and the Chemical Examiner, and to take such evidence of the prosecution in order to prove that the ghee in question was the ghee which was analysed by the Chemical Examiner. The evidence thus taken shall be returned to this Court by 6th February 1918. The accused will be entitled to cross examine.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 141

ROE AND JWALA PRASAD, JJ.

Sheo Prasad Rai and another—Defendants—Appellants.

v.

Dharam Sen Rai and others—Plaintiffs—Respondents.

Misc. Civil Appeal No. 201 of 1917, Decided on 10th January 1918, from decision of Dist. Judge, Shahabad.

Execution—Delivery of possession of property not covered by decree—Application by judgment-debtor for restoration of property and correction of mistake—Court should correct its mistake—Civil P. C., S. 152.

A Court should correct its own mistakes and not drive the parties to a subsequent suit. Where in execution of a decree the Court officer delivers possession without the knowledge of the judgment-debtor of lands not covered by the decree, the Court is bound to correct the mistake on an application made by the judgment-debtor within the period of limitation. [P 142 C 2]

Shivanandan Rai—for Appellants.

D. N. Sirkar—for Respondents.

Judgment.—The facts of this case are that the respondent was a plaintiff in a case in which the appellant was defendant regarding a number of bamboo clumps and the land on which they stood. The matter was referred to arbitration and a compromise arrived at outside the Court, whereby it was declared that the defendant consented to a decree with regard to the lands in suit, the boundaries whereof are given in the registered deed of sale dated the 15th Bhadon 1315 F. S. It was further stated in the petition of compromise that there was no

necessity for any delivery of possession but that if the plaintiff did take out delivery he should pay the costs thereof. A decree was made upon the basis of this compromise and on 22nd September 1915 an application was made for execution. After various orders of the Court indicating that care was taken to bring the application for execution into agreement with the decree, an order was made on 5th October 1915 that delivery of possession be made and on 10th January 1916 it was written: "Possession delivered. No objection raised, ordered that the case be dismissed." On 25th July the judgment-debtor appeared in Court with an objection to the proceedings saying that delivery of possession had been made by the Court officer behind his back, and that under cover of it the decree-holder had three days before his petition trespassed upon land not covered by the petition of compromise. He further alleged that two clumps only had been awarded to the decree-holder and that under the terms of the compromise, delivery of possession was declared to be unnecessary. He therefore suggested that the execution proceedings were illegal and void, ultra vires, etc., and asked that they be entirely cancelled. On the case coming up before the learned Munsif he regarded the application as one under S. 151, Civil P. C., and said:

"I am afraid the applicant cannot have equity on his side now. When he left his opportune moment to seek relief the Court cannot go behind the decree. On the other hand the decree-holder does not seem to have acted on bona fide grounds when he was given the khata No. 7 of the property in question he should have given the survey plot as well, but which he has not. However the applicant should seek redress in the Court of law by the regular suit. Under the circumstances of the case the application is dismissed and the parties bear their own costs."

This order was taken in appeal to the District Court. The appeal was dismissed on the ground that it was not a proceeding under S. 47, Civil P. C. In support of this view the argument advanced was that when the execution proceedings are no longer pending but are closed the Court has completely discharged its duty. It was suggested that the judgment debtor having wasted ten months before coming to Court had put himself outside the sympathy of the Court. The learned Judge adds:

"The boundaries given in the decree are a little ambiguous in places and the judgment-debtor probably wants to take advantage of that now to

dispute what land was actually given by the decree. I cannot believe that the insertion of the khata number together with the touzi number could have misled anyone when the land was fully described in the execution proceedings, or that if this mistake could conceivably be made the judgment-debtors could so long have been ignorant of it. I do not think applicant can put in such an application after the proceedings have been completely closed and finished and I doubt very much his good faith in bringing it."

It is urged in appeal that the Courts below have been entirely in error as to the point of view from which the case should have been regarded. The dictum in *Fakaruddin Mahomed Ahsan v. Official Trust of Bengal* (1) quoted with approval in *Ram Saran Pande v. Janki Pande* (2), to the effect that where a decree has been completely executed the Court executing the decree is functus officio has not found complete favour in subsequent decisions. In the case of *Duljeet Gorain v. Rewul Gorain* (3) the Court was held bound to correct if it made a delivery of possession not in accordance with the decree. This view has been followed in such cases as that of *Biru Mahata v. Shyama Churn Khawas* (4). There is no doubt a distinguishing feature in the case of *Collector of Jaunpur v. Bithal Das* (5), but the general principle that the Court should correct its own mistake and not drive the parties to a subsequent suit was upheld. If indeed the Court officer did, in the proceedings on the order of 5th October 1915, deliver possession without the knowledge of the judgment-debtor of lands not covered by the decree, the Court was required to correct the mistake on an application made by the judgment-debtor within the period of limitation. The learned Judge has, as we have indicated, dealt with the case also on the merits and decided that nothing in excess of the decree was delivered. We have had the order of the bailiff, his return thereon, and the original decree translated. We find that the bailiff, purported only to have delivered possession of the lands covered by the decree. There is no evidence at all on the record to show that this is not correct. In the order to the bailiff is a verbatim copy of the boundaries of the lands awarded to the plaintiffs as given in the decree

(1) [1884] 10 Cal. 538.

(2) [1895] 18 All. 106.

(3) [1874] 22 W. R. 435.

(4) [1895] 22 Cal. 483.

(5) [1902] 24 All. 291.

in the suit. If the lands upon which the alleged trespass by the decree-holder took place lie within those boundaries, there has been no trespass. If they fall outside those boundaries the trespass is a tort by the decree-holder independent of any proceedings in execution and his remedy lies by suit and not by application under S. 47. We therefore dismiss this appeal with costs. Hearing fee two gold mohurs.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1919 Patna 143 (1)**

DAS, J.

Hamid Hasan and another — Petitioners.

v.

Shahzad Khan and another—Opposite Parties.

Civil Revns. Nos. 107 and 124 of 1919, Decided on 8th July 1919, from decree of Sub-Judge, Patna.

(a) Contract—Liability—Stranger.

No one is liable on a contract except a party thereto. [P 143 C 2]

(b) Contract Act (9 of 1872), S. 230—Agent is not personally liable under contract made for principal.

An agent cannot personally enforce a contract entered into by him on behalf of his principal, nor is he personally bound by such contract.

[P 143 C 2]

A finding by a Court to the effect that it is "satisfied that the defendant took the articles, a list of which was prepared at the time, on hire He entered into the contract and disclosed the purpose for which he took, and the person to whom he sent, the articles" is not a finding that he acted as agent in the transaction.

[P 143 C 2]

Shiv Narayan Bose, Kulwant Sahay, Rajendra Prasad, Rai Guru Saran Prasad and Ram Prasad—for Petitioner.

Ragho Prasad—for Opposite Parties.

Judgment.—These two revision cases arise out of a Small Cause Court suit instituted by the opposite party against the petitioner in each of these cases and against another person against whom no decree has been passed by the Court of Small Causes. It appears that the opposite party hired out certain articles for the purpose of the Chatri Sabha which was held in Patna on 27th August and 9th December 1916. The question for my determination is who is liable on the contract.

The plaintiff in his plaint specifically states that he hired out the articles on the personal liability of Moulvi Hamid Hasan and defendant 2, who has been dismissed

from the action. He does not state that there was any contract between him and defendant 3 at all and as I read the judgment of the learned Judge of the Small Cause Court, he does not find that there was any contract between defendant 3 and the plaintiff. It is in my opinion, well settled that no one is liable on a contract except a party thereto. It is not the plaintiff's case that defendant 3 was a party to the contract. It is not found by the Court below that defendant 3 was a party to the contract. It is however urged on behalf of Moulvi Hamid Hasan that he contracted merely as an agent and therefore no decree could be passed against him and he relies upon S. 230, Contract Act. That section in accordance with the English rule lays down that an agent cannot personally enforce a contract entered into by him on behalf of his principal nor is he personally bound by such contract. Now, in this case as I read the judgment, there is no finding that Moulvi Hamid Hasan entered into the contract as agent. The finding upon which the learned vakil appearing on behalf of Moulvi Hamid Hasan relies is this :

"I am satisfied that defendant 1 took the articles, a list of which was prepared at the time on hire for the Sabha. He entered into the contract and disclosed the purpose for which he took and the person to whom he sent, the articles and paid Rs. 140."

In my opinion it does not amount to a finding that defendant 1 acted as an agent in the transaction. I hold that upon the plaint itself and upon the finding of the learned Judge of the Small Cause Court he was wrong in passing a decree against defendant 3. Civil Revision Case No. 124 of 1919 must therefore be allowed with costs which I assess at two gold mohurs, to be paid by the plaintiff. I further hold that Moulvi Hamid Hasan is liable on the contract into which he entered with Shahzad Khan. Civil Revision Case No. 107 of 1919 must accordingly be refused with costs, which I assess at two gold mohurs.

V.S./R.K.

*Order accordingly.***A. I. R. 1919 Patna 143 (2)**

DAS, J.

Asiruddin and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 17 of 1919, Decided on 22nd July 1919.

Criminal P. C. (5 of 1898), S. 476—Prosecution under S. 476 is bad in absence of evidence of offence on record.

Where there is no evidence on the record to show that an accused person is guilty of the offence with which he is charged, an order for his prosecution under S. 476, is bad in law and must be set aside. 48 I. C. 894 and 37 Cal. 250, *Foll.*

[P 144 C 1]

Ahghar Gajendra Prasad Das and Gour Chandra Pal—for Petitioners.*

Judgment.—This application is directed against an order passed by the Sub-Divisional Officer of Sitamarhi sanctioning the prosecution of the petitioners under S. 476, Criminal P. C. for offences alleged to have been committed under S. 196, 471, 471/109 and 196/109, I. P. C. It appears to me, reading the affidavit which has been placed before me, that there is absolutely no evidence on the record to justify the conviction of the petitioners under the sections which I have just enumerated. It has been held by this Court in the case of *Abdul Sattar v. Emperor* (1) that where there is no evidence on the record to show that the petitioner was guilty of any offence with which he is charged, the order for his prosecution is bad in law and should be set aside. Mookerjee, J., in the case of *Jadunandan Singh v. Emperor* (2), expressed the same view. He said:

"The principle which should guide Courts in taking action under S. 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction."

On the materials on the record I am of opinion that there is no reasonable probability of conviction and that therefore the order under S. 476 is bad, and I accordingly direct that the order sanctioning the prosecution be set aside and that no further proceedings be taken in the matter.

V.S./R.K.

Order set aside.

(1) [1918] 48 I. C. 894.

(2) [1909] 37 Cal. 250=4 I. C. 710.

A. I R. 1919 Patna 144

DAS, J.

Kariman Ahir and others—Plaintiffs—Appellants.

v.

Nirmal Kumar and another—Defendants—Respondents.

Second Appeal No. 127 of 1918, Decided on 23rd June 1919, from decision of Sub-Judge, Shahabad, D/- 20th September 1917.

(a) **Bengal Village Chaukidari Act (6 of 1870), S. 51—Chakran lands—Right of occupancy cannot be acquired.**

Inasmuch as chakran lands are held on condition of service a chaukidar in occupation of such lands cannot acquire a right of occupancy therein.

[P 146 C 1]

(b) **Bengal Village Chaukidari Act (6 of 1870), S. 51—Chaukidar is not liable to be ejected until in service.**

A chaukidar so long as he performs the duties of his office, is not a trespasser and is not liable to be ejected from such lands.

[P 145 C 2]

(c) **Bengal Village Chaukidari Act (6 of 1870), S. 51—Chakran lands—Title of zamindar remains unaffected—After transfer to landlord land is either "mal" or zerait—Bengal Tenancy Act (8 of 1885), S. 181.**

The title of a Zemindar to chakran land is always there and remains unaffected by the fact that such land is appropriated to the maintenance of an officer who performs the duties of village watchman. Upon the transfer of such land to the Zemindar, it is at his disposal and may be treated by him as his mal land or zerait land but once he elects to treat the land as his mal, he cannot afterwards say it is his zerait land.

[P 145 C 1, 2]

Ambika Prasad Upadhyaya—for Appellants.

Sushil Madhab Mullick—for Respondents.

Judgment.—The question which I have to determine in this appeal is whether the appellants have acquired a right of occupancy in Khasra plot No. 434. The lower appellate Court has come to the conclusion that the appellants are the tenants in respect of the plot No. 434, but that they have not acquired a right of occupancy therein. In the result the lower appellate Court refused to make a declaration that plot No. 434 is the guzashta land of the plaintiffs appellants, but did make a declaration that the plaintiffs are the tenants in respect of plot No. 434 and are entitled to remain in possession thereof. The plaintiffs have appealed and on their behalf it has been argued that the lower appellate Court should have held that they have acquired a right of occupancy in respect of plot No. 434. The respondents have filed a cross-appeal and they challenge the finding of the lower appellate Court that the appellants are their tenants in respect of that land.

It will be convenient to deal with the cross-appeal first. The lower appellate Court has arrived at the following findings of facts: (1) The disputed land is chaukidari chakran land. (2) The plaintiffs' father was the chaukidar in possession of the land in dispute but that

the defendants have accepted rent from him and have treated him and the plaintiffs as their tenants. (8) There were resumption proceedings in respect of the land under the Chaukidari Act, and the Government transferred the land to the defendants.

It was argued on behalf of the respondents that on these findings the lower appellate Court should have held that the plaintiffs are mere trespassers and are liable to be ejected as such. They contend that they are not hampered by any recognition of tenancy before the resumption proceedings inasmuch as their title to the land accrued only after the resumption proceedings, when the Government transferred the land to them. They say that upon such transfer they were entitled to hold the land as their *zerait* land, and that they were at liberty to do so, notwithstanding the fact that they may have recognized the appellants as their tenants at a time when they had no title to the land. This argument, in my opinion, is entirely unfounded, for it rests on the fallacy that the title to the land in dispute accrued to the defendants upon transfer of the land to them by Government. The nature of *chaukidari* *chakran* lands was the subject of very careful investigation in the case of *Joykishen Mookerjee v. Collector of East Burdwan and Brij Roy Dhareedar* (1). That case has always been recognized as establishing that the title of the zamindar to the *chakran* land was always there and that it remained unaffected by the fact that such land was appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. Originally these duties were rendered solely to the zamindar, who, instead of paying wages to the *chaukidar*, made a grant of some land to the *chaukidar* for his maintenance. It was recognized later that the general public as well as the zamindar was interested in their services, and therefore by various regulations the *chaukidars* were made removable by the Magistrate, but as the Judicial Committee points out, there is "nothing in these regulations which takes from the zamindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the

chaukidar such services as he was bound by law or usage to render to the zamindar."

It must also be remembered that by S. 41, Regn. 8 of 1793, the whole of these *chakran* lands were declared as annexed to the *malguzari* lands and responsible for the public revenue. In other words, the antecedent title of the zamindar in these lands was recognized in the Regulation of 1793, and in my opinion, having regard to that regulation and the long series of cases decided by the Calcutta High Court: see *Kazi Newaz Khoda v. Ram Jadu Dey* (2) it is now too late in the day to argue that the title of the zamindar to these lands accrues only on the transfer of such lands to the zamindar after the resumption proceedings. It was argued however on the basis of *Shaikh Jonab Ali v. Raki-buddin Mallik* (3), that upon the transfer of such land to the zamindar, such land was at the disposal of the zamindar, and could be treated by him either as his *mal* land or *zerait* land. That undoubtedly is so but, in my opinion, having elected to treat the land as his *mal* land he cannot turn round and say:

"The land is now at my disposal, and I shall treat it as my *zerait* land."

The argument would have great force if it could be shown that he had no title to the land at the time when he treated it as his *mal* land. But that is not my view, and I am supported by the language employed by the legislature in S. 51, Village Chaukidari Act, where the legislature has said as clearly as it knows how to say that the transfer to the zamindar will be subject to all contracts made before such transfer by virtue of which any person other than the zamindar may have any right to such land. In my view S. 51, Village Chaukidari Act, recognizes two principles which are absolutely destructive of the elaborate argument advanced before Mr. Mullick on behalf of the respondents. It recognized, first of all, the antecedent title of the zamindar to these lands, and it recognizes, secondly, the validity of the antecedent contracts entered into by the zamindar respecting these lands. Contract of tenancy is one of the contracts within the scope of S. 51, and therefore I am of opinion that the lower appellate Court, on the facts found by it, was right in coming to the conclusion that the

(2) [1957] 34 Cal. 109.

(3) [1905] 9 C. W. N. 571.

(1) [1863-66] 10 M. I. A. 16=2 Sar. 54 (P.C.).

appellants were not trespassers and were not liable to be ejected as such.

I will now deal with the appeal. A right of occupancy is purely a statutory right, it is not a contractual right. Therefore a right of occupancy is not saved by S. 51, Village Chaukidari Act. But the appellants argue that they have been in occupation of the land in dispute as tenants for over twelve years, and therefore they have acquired a right of occupancy by Statute. In my opinion, this argument is not well founded. A right of occupancy is a right conferred by the Bengal Tenancy Act, and S. 181 of that Act provides that nothing in that Act shall affect any incident of a ghatwali or other service tenure. It is true that the incidents of a ghatwali or other service tenure are not dealt with in the Bengal Tenancy Act, but if it can be established that one of the incidents of a service tenure is that rights of occupancy cannot be acquired therein, then there cannot be any doubt that a right of occupancy, being a right conferred by the Bengal Tenancy Act, cannot be acquired in the land in dispute.

It seems to me that on principle a chaukidar cannot acquire a right of occupancy in chakran lands. Chakran lands are held on condition of service, and occasionally a small rent is also paid by the chaukidar. Now, if it were possible for him to acquire a right of occupancy in such land, he could after twelve years' possession refuse to perform any services and yet claim to retain the land. The question was raised in the case of *Hurrogobind Raha v. Ramratno Dey* (4) but was not decided. But Garth, C. J., in that case said:

"We are very much disposed to think that if the defendants held by a service tenure they could not acquire a right of occupancy. However it is not necessary to decide that point in this case."

But in the case of *Upendra Nath Hazra v. Ram Nath Chowdhry* (5) Maclean, C. J., held that a right of occupancy could not be acquired in a service tenure. He said:

"I think that upon principle, having regard to the nature of ghatwali lands, the acquisition of occupancy rights in these lands is inconsistent with the incidents of such tenures; and this view gains support from S. 181, Ben. Ten. Act, which seems to me to be inconsistent with the view of the acquisition of such rights in ghat-

wali lands. This conclusion seems to be in accordance with Mitra, J's., view on the point expressed in the case cited, that any such right is not susceptible of acquisition in the ghatwali lands."

In my opinion, it is clear both on principle and authority that so long as the lands retained the character of chakran lands, the appellants could not acquire a right of occupancy in such lands. I think therefore that, upon the facts found by the lower appellate Court, it was right in coming to the conclusion that the appellants have not acquired a right of occupancy in plot 434. Both the appeal and cross-appeal therefore fail and they must each be dismissed with costs.

V.S./R.K.

Appeal dismissed.

*** A. I. R. 1919 Patna 146**

DAWSON-MILLER, C. J. AND MULLICK, J.

Hukum Chand and others—Appellants.

v.

Raja Ran Bahadur Singh and another—Respondents.

First Appeal No. 226 of 1917, Decided on 4th June 1919, from decision of Addl. Sub-Judge, Hazaribagh, D/- 24th July 1917.

* (a) Transfer of Property Act (4 of 1882), S. 52—Transfer during pendency of suit is affected by S. 52 even if suit is compromised provided compromise is not mala fide to defeat purchaser.

The doctrine of lis pendens, as embodied in S. 52, applies to transfers during the pendency of a suit even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive arrangement entered into with the object of defeating a purchaser. [P 154 C 2]

* (b) Civil P. C. (5 of 1908), O. 23, R. 3—Transfer pendente lite under authority of Court—Subsequent compromise of suit—Court before recording such compromise should see whether it is bona fide or merely to prevent purchaser from setting up defences open to him—Court should refuse to record if compromise is mala fide.

Where a transfer is made pendente lite under the authority of the Court within terms of S. 52, T. P. Act, and subsequently the original parties to the suit arrive at a compromise, the Court before recording the compromise must consider whether it is a bona fide one or merely colourable with the object of preventing the transferee from setting up such defence to the action as might otherwise be open to the original defendant. If there is a real and substantial defence to the claim, the compromise is not a lawful agreement within the meaning of O. 23, R. 3 and the Court should refuse to record it and to pass a decree in accordance with the terms thereof. [P 155 C 1].

(4) [1879] 4 Cal. 67.

(5) [1906] 33 Cal. 630.

(c) **Chota Nagpur Encumbered Estates Act (6 of 1876), S. 3—Holder of estate is incompetent to effect any transfer of estate.**

By virtue of the provisions of S. 3, Chota Nagpur Encumbered Estates Act, so long as an estate is under the control of the manager the holder of the estate is incompetent to mortgage, charge, lease or alienate his immovable property or any part thereof and his action in the matter may be ignored. [P 155 C 2]

(d) **Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 17 and 19 — Commissioner cannot himself grant leases and enter into agreements binding on manager though his sanction to leases by manager is necessary.**

The mere fact that by virtue of the provisions of R. 16 of the rules framed by the Lieutenant-Governor under S. 19, the power to grant leases vested in manager under S. 17 of the Act is subject to the sanction of the Commissioner, does not in itself give the Commissioner power to grant a lease without consulting the manager at all, much less can the Commissioner, unknown to the manager, bind him by an agreement compelling him to exercise his statutory powers.

[P 156 C 2 ; P 157 C 1]

(e) **Chota Nagpur Encumbered Estates Act (6 of 1876), Ss. 9 and 19 — Manager is different person from Deputy Commissioner—Latter's powers are limited by R. 5—He cannot himself exercise powers of manager.**

Section 9 contemplates that the manager may be either the Deputy Commissioner himself or some one else. In the latter case the powers of the Deputy Commissioner are confined, by R. 5 of the rules framed by the Lieutenant-Governor under S. 19 of the Act, to a general control over the management of another person. To say that in such a case the Deputy Commissioner may treat the manager as non-existent and exercise his powers himself would be to extend the scope of the rule beyond its legitimate meaning. [P 157 C 1]

(f) **Chota Nagpur Encumbered Estates Act (6 of 1876)—Manager's powers are analogous to powers of guardian under Guardians and Wards Act.**

The powers granted by the Chota Nagpur Encumbered Estates Act to a manager should be construed as strictly as the powers of guardians and managers of minors. [P 157 C 2]

(g) **Chota Nagpur Encumbered Estates Act (6 of 1876), S. 17 — Manager is entitled to enter into contract to grant lease—His power to grant leases is not affected.**

It is not essential to the proper exercise of a statutory power to grant a lease that the person having this power should also have power to enter into a contract to lease. [P 157 C 2]

The power to grant leases given to a manager by S. 17 does not include the power to enter into an executory contract to grant a lease. [P 157 C 2]

(h) **Deed—Construction—Deed contemplating further execution of deed of contract—If this is imperative and not formal, previous deed of contract is unenforceable otherwise it remains binding though formal document is not drawn up.**

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction, whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the

desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the conditions are unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored. [P 158 C 1]

Rash Behary Ghosh, Hasan Imam, Sultan Ahmad, Sushil Madhav Mullick and S. N. Bose—for Appellants.

B. C. Mitter, K. B. Dutt, B. N. De and Mohammad Fakhruddin—for Respondents.

Judgment.—This is an appeal from a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated 24th July 1917, dismissing the plaintiffs' suit for specific performance of a contract, alleged to have been entered into on behalf of the Raja of Palganj to grant a permanent lease of Paresnath Hill to the Digambari community of Jains in India.

The suit was instituted on 5th September 1913 in the names of Dhannu Lal Agarwalla and Parmesti Das Serowgee, as plaintiffs suing on behalf of themselves and as representatives of the entire Digambari Jain community of India. Both these gentlemen died about a year after the suit was instituted. The present plaintiffs thereupon applied under the provisions of the Civil Procedure Code (O. 1, R. 8,) to be made parties, and by an order of the lower Court, dated the 1st February 1915, their names were added to the record as plaintiffs and the suit proceeded.

At the time when the suit was instituted the defendant's estate was being administered by Babu Krishna Chandra Ghosh, who had been appointed Manager of the Palganj Raj under the provisions of the Chota Nagpur Encumbered Estates Act (Bengal Act 6 of 1876), and the defendant was sued through the said Manager as his representative and guardian. Babu Krishna Chandra Ghosh, having ceased to act as Manager, Babu Janki Nath Gupta was appointed in his place, and by an order of 2nd February 1915 his name was substituted on the record as Manager and guardian in place of the former Manager.

The events leading up to the present suit are referred to at some length in the pleadings and a short history of the same is set out in the judgment now

under appeal. It is convenient to refer again shortly to the circumstances under which the agreement sought to be enforced came to be made. The range of hills known as Paresnath Hill lies in the Hazaribagh District and runs roughly from east to west. It has a central range about a mile and a quarter long with outlying spurs, a part of which is Government property. The greater part of the Hill, however, is claimed as part of the Palganj Zamindari. For many years this Hill has been an object of adoration by the Jains who hold an Ekrarnama from the father of the present Raja of Palganj agreeing to grant them such lands on the Hill as they may need for the purpose of building temples. Indeed, at one time they went so far as to claim the Hill as their own under sunnads granted by Akbar and Ahmed Shah. These however were found by the Calcutta High Court to have been spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship, and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard, rightly or wrongly, as an interference with their vested rights.

In the year 1907 the Government of India approved a scheme submitted by Mr. Carey, the then Deputy Commissioner of Hazaribagh, for opening a sanitarium and residential buildings for Europeans on the western spurs of the range and on its northern slopes, leaving the crest of the central range for the Jains whose temples at present occupy that site. This scheme met with strong opposition from both the Sitambari and Digambari sects of the Jain community, which resulted in the intervention of Sir Andrew Fraser then Lieutenant Governor of Bengal, who took a personal interest in the matter and endeavoured to bring about a settlement which would be satisfactory to all parties. In August 1907, he visited the Hill accompanied by the leading representatives of the Jains of both sects and held a darbar at Madhuban, when he suggested that the Jains should themselves purchase the Raja's interest in the Hill. This suggestion appears to have

commended itself to the Jains, and in September of the following year, after some further negotiations, a conference was held at Ranchi with a view to settling terms. This was a task of some magnitude, as there were many interests to be considered. Certain lease holders had vested interests, the Sonthal tribes claimed the right of hunting wild animals over the whole of the Hill, the Zamindar of Nawagarh claimed the southern slopes as part of his zamindari, and other claims and encumbrances of a public and private nature had to be considered. Meantime some correspondence passed between the Government of Bengal and the Government of India on the subject, and the latter had expressed their approval of the suggestion that the central hill should be leased to the Jains. The conference at Ranchi was attended by Sir Andrew Fraser, Mr. (afterwards Sir William) Duke, Chief Secretary to the Government of Bengal, Mr. McIntosh, Commissioner of Chota Nagpur, the Raja of Palganj and representatives of the Digambari and Sitambari Jains. Certain proposals and counter-proposals were made at this meeting, but it terminated without any settlement being come to. Negotiations however still continued between Sir Andrew Fraser and the representatives of the Jains. Two proposals were suggested, one a temporary arrangement terminable when the estate should be restored to the Raja, and the other a permanent arrangement granting a permanent lease at a fixed rental in addition to premium, certain rights being reserved to the Raja. It may be mentioned here that the Sitambari Jains already held leases of certain plots on the Hill the rental of which was Rs. 1,500 per annum, and it was that sect which had the option of taking further plots for the purpose of building temples under the agreement with the late Raja above referred to. Their desire apparently was to obtain complete control and exclusive rights over the whole Hill, including the jungles, villages, and existing lessees. Sir Andrew Fraser would not consent to this scheme, as appears from his letter of 7th October 1908 addressed to Maharaj Bahadur Singh (Ex. 19). Subsequently, on 20th October 1908, Pandit Mohan Krishna Dar, representing the Digambaris, wrote to Sir Andrew Fraser requesting him to

use his influence to bring about a settlement on what the writer considered a just and reasonable basis, stating the terms he was prepared to offer for a permanent lease, namely, Rs. 50,000 premium and a rental of Rs. 12,000 annually including the Rs. 1,500 payable by the Sitambaris. Further correspondence then followed between Sir Andrew Fraser and the original plaintiffs as the accredited representatives of the Digambaris, and on 3rd November 1908 the latter wrote offering on behalf of the Digambari Jain community and without prejudice to their rights to take a permanent lease of the whole Hill subject to existing leases paying Rs. 50,000 by way of premium (a cheque for which sum was tendered), an annual rental of Rs. 12,000, the right of cutting timber in the jungles being reserved to the Raja. On 25th November Sir William Duke wrote in reply detailing the terms which the Lieutenant-Governor would be prepared to accept. These were, with slight modifications, the terms already offered on behalf of the Digambaris. Any excess over and above a limit of Rs. 2,000 which should become payable in future on account of existing leases was to be added to the annual rental of Rs. 12,000, and the mineral rights on the Hill were to be retained entirely by the zamindar. The demarcation of the Hill was to be made by the Deputy Commissioner and was to exclude the villages in the plain. These terms were prefaced by the following remark:

"Without discussing the precise character of the rights and ownership of the zamindar of Palganj over the Paresnath Hill, it is proposed that in deference to the wishes which you and other Jains have expressed the ownership should be limited by a distinct agreement in the following respect."

The letter ended thus:

"I am to request that you will state clearly and definitely whether you accept these terms and conditions. I am also to request that you will state whether you are to be the contracting parties with the Court of Wards and whether in that capacity you represent the Digambari Jains only or the Jains in general. On hearing from you that you accept these terms and who the contracting parties on your behalf will be, the Lieutenant-Governor will give orders to have the agreement drawn up by the Government Solicitor in consultation with any lawyer whom you choose to name."

On 26th November the original plaintiffs wrote acknowledging the letter of the previous day and adding:

"We are very thankful to His Honour for his kind and sympathetic consideration of the offer made by us without prejudice on behalf of the Digambari Jains of India. We shall esteem it a great favour if you will kindly permit us to modify the terms of agreement as set forth in Para 2, Cls. (1) to (6) of your favour. The terms as set forth by you are given below and the modifications prayed for by us are shown in italics. In the margin we have indicated, in brief, some of the reasons which have induced us to make the aforesaid modifications."

Then follow the proposed terms and the modifications which were not of a substantial character. The letter concludes in this way:

"We hereby accept the terms modified as above, provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officer representing the Court of Wards as is authorized to sign such agreement, (2) the Raja of Palganj, and (3) ourselves as representing the Digambari Jains. The permanent lease and other documents may hereafter be prepared as suggested by you and in those documents it would be better if you would kindly allow to join us at least two other representatives of our sect, to wit, Seth Manick Chand of Bombay and Lala Devi Sahay of Ferozepur."

The only modification of the proposed terms which calls for remark was the first which stipulated:

"A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservation hereinafter contained."

The proposed terms having contemplated a grant to the Jains generally and not to the Digambari sect, attention is drawn to this because one of the points urged in argument by the respondent was that a community such as the Digambari Jains, not being a legal entity, could not be the grantees of a lease. On 30th November 1908, Sir William Duke replied to this letter, stating:

"I am directed to acknowledge the receipt of your letter, dated 26th November 1908, and to say that the Lieutenant Governor has been pleased to accept the modified terms of agreement as set forth therein. I am to enclose herewith for your information a copy of letter No. 4791, dated 30th November 1908, to the Solicitor to the Government of India, and to request you to nominate a lawyer in consultation with whom the draft agreement may be prepared."

The letter to the Government Solicitor, No. 4797, a copy of which was enclosed was as follows:

"I am directed to state for information, that the Lieutenant-Governor has been pleased to sanction the grant to the Digambari Jains of a permanent lease of the Hill known as the Paresnath Hill, in the District of Hazaribagh, owned by the zamindari of Palganj on the conditions mentioned below. (1)

A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservations herein-after contained, so that the Hill may be protected from every thing repugnant or opposed to the feelings or the religious tenets of the Jains. (2) This lease is to be subject to the existing leases and arrangements, but the income derived from these existing leases and arrangements shall go to and be received by and be assigned over to the Digambari Jains, provided that any amount payable on account of these leases over and above Rs. 2,000 shall be added to the annual payment of Rs. 12,000 referred to below. (3) The Digambari Jains have paid by a cheque Rs. 50,000 (fifty thousand) by way of premium and no further premium will be demanded. (4) The Digambari Jains will also pay an annual sum of Rs. 12,000 by way of rent, this sum of Rs. 12,000 will include the Rs. 1,500 now annually payable by the Sitambari Jains. (5) The Palganj zamindar shall be entitled only to the premium and the rent aforesaid and excess over Rs. 2,000 as mentioned in Cl. (2), as also to the rents of sub-leases under Cl. (7). He shall also be entitled to cut the jungle according to the necessity of himself and of his present estate, such cutting to be done in accordance with rules to be framed by the Deputy Commissioner with the sanction of the Commissioner, regulating the kind of timber or wood to be cut, and the time, conditions, and circumstances of the cutting. The right to minerals on the Hill shall be retained entirely by the zamindar, but no steps shall be taken for the prospecting for minerals or for their working, collecting, securing or removal without the order of the Deputy Commissioner passed with the sanction of the Commissioner and without the consent of the Jains; such consent only to be withheld when anything repugnant to the religious feelings of the Jains is proposed. Beyond this the zamindar will have no other right, interest, claim or control over any part of the aforesaid hill, as long as the stipulated annual payment is duly made. (6) The demarcation of the hill shall be made by the Deputy Commissioner and shall exclude the villages on the plain so as to render it more convenient to deal with the existing leases and rights. (7) The Digambari Jains will not be entitled to grant any sub-lease with regard to any piece or parcel of land not now covered by the aforesaid subsisting leases without the consent of the Zamindar of Palganj in writing, and the rents from such sub-leases shall go to the said Zamindar of Palganj. I am to request you to draw up, in consultation with any lawyer whom the Jains may choose to name, a draft agreement embodying the above terms which have been accepted by the Digambari Jains for execution by (1) Deputy Commissioner of Hazaribagh as Manager of the Palganj Estate now managed by the Court of Wards under the Chota Nagpur Encumbered Estates Act, (2) the Raja of Palganj, and (3) Babus Dhannu Lal Agarwalla and Parmesti Das Serowgi as representing the Digambari Jains."

The terms set out in the above letter were those already agreed to between the plaintiffs and Sir Andrew Fraser and they contain the agreement of which specific performance is sought. The agreement

embodying these terms was never in fact drawn up or executed, but a draft lease was prepared by the Government Solicitor and forwarded to the plaintiffs' Solicitors in January 1909. In August 1909 it was decided to make a survey and prepare a Record of Rights of the area to be leased which had not up to that time been delimited, with a view to obtain the requisite particulars for the grant. This took some time, and disputes arose as to the line of demarcation, the Digambaris representatives contending that the Hill extended further into the plain including several villages lying therein outside the demarcation line laid down by the Deputy Commissioner; and before the Survey Report was completed the Government of Bengal, acting on instructions from the Government of India, informed the plaintiffs' Solicitors that the arrangement arrived at for a settlement would not be carried through. This decision was conveyed in a letter from the Government of Bengal to the plaintiffs' Solicitors on 6th September 1910 in the following terms :

"Gentlemen,—I am directed to state that on behalf of the Raja of Palganj, whose estates are under the management of the Court of Wards, this Government agreed to the grant to the Digambari sect of the Jains of a lease of the Paresnath hill in the district of Hazaribagh on certain conditions proposed in a letter, dated 26th November 1908, from your clients, Seth Parmesti Das Serowgi and Babu Dhannu Lal Agarwalla. Having regard however to the preferential claims of the Sitambari community the Government of India, to whom the matter was reported, do not feel justified in giving effect to the offer of settlement made by this Government. I am therefore to request that you will be so good as to inform your clients that the arrangement proposed in November 1908 has fallen through and that the Accountant-General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits) the sum of Rs. 50,000 which they had paid as premium."

This decision was, no doubt, arrived at in consequence of a report made by Mr. John Reid, the Settlement Officer of the Chota Nagpur Division, on 3rd June 1910 (Ex. D-1) in which he stated that the grant of the proposed lease to the Digambari Janis would result in serious differences and disputes between them and their rivals, the Sitambaris, who were in possession of the existing temples and had preferential rights over the Hill in case they wished to erect new temples. The Digambaris, on the other hand, had no such rights and were not

in possession of any temples of their own. In dealing with what he considered would be the immediate result of granting the proposed lease Mr. Reid reported that :

"The Digambari Society would proceed to erect new tonks, some of them possibly adjacent to the already existing tonks which are managed by the Sitambaris. The Sitambaris would of course object and would fall back on their rights under the agreement of 1872. To enforce their legal rights they would, nodoubt, resort to violence, and very likely the site of every proposed new tonk would be the scene of a riot of greater or less magnitude. I understand that it is not the local authorities but the Local Government who propose to sanction the lease of the hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease it is evidently one which cannot be carried through."

There can be no question that these two rival branches of the Jain community entertain feeling of hostility towards each other, and the conclusions arrived at by Mr. Reid may possibly have been justified. However that may be, the Government of Bengal definitely refused to proceed further in the matter. At that time Sir Andrew Fraser's term of office as Lieutenant-Governor had come to an end. The appellants refused to accept the cheque and interest tendered in the letter of 6th September 1910, and on 5th September 1913 instituted this suit claiming specific performance of the contract mentioned or alternatively damages against the defendant. Various defences were pleaded in the written statement. The most important of these may be summarized thus:

(1) That the defendant's estate was at all material times vested in a Manager under the Chota Nagpur Encumbered Estates Act, 1876, by S. 3 of which the defendant was incompetent to charge, lease or alienate his immovable property or to enter into any contract which might involve him in pecuniary liability, and if, and in so far as he had purported to do so by himself or through others, such contract was invalid. None of the persons conducting the negotiations had any authority to enter into a binding contract. (2) That under the Act the only person having power to deal with the defendant's property was the Manager, and even his

powers derived from S. 17 of the Act did not include the power of entering into an agreement to grant a lease. (3) That no binding agreement was entered into, and that what took place was mere negotiation, all parties thereto contemplating the necessity of ascertaining the exact legal rights of all persons interested in the hill before a lease could be granted, no date being fixed for the commencement of the demise. (4) That the parties were fully aware that none of the persons conducting the negotiations had authority to enter into a binding agreement, and that the plaintiffs agreed only to be bound in the event of a short agreement embodying the terms being prepared and executed by such person or persons as were authorized to sign such agreement and that this was never done. (5) That Sir Andrew Fraser was acting solely in an executive capacity and had no authority to enter into a contract binding upon the defendant or his estate. (6) That negotiations were not conducted on the basis of obtaining the highest value for the property. (7) That the contract should not be enforced on the ground of public policy.

The Additional Subordinate Judge of Hazaribagh, before whom the case came for trial, dismissed the suit, being of opinion that none of the officers who conducted the negotiations with the plaintiffs was competent to make the agreement in question, and that it had therefore no operation in law. His judgment was based mainly upon the interpretation of the provisions of the Chota Nagpur Encumbered Estates Act. By S. 3 of that Act the proprietor of an estate vested in a Manager under the Act, so long as that management continues, is incompetent to mortgage, charge, lease, or alienate his immovable property or any part thereof. The powers vested in the Manager by S. 17 includes the power to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon. By an amending Act of 1909 what is now known as Cl. 18-B was added. This was not in operation at the date of the agreement now under consideration. It provides as follows:

"Subject to the sanction of the Commissioner, the Manager shall have power to enter into any contract or to execute or relinquish any lease or counterpart of any lease or to take any action not otherwise provided for in this Act which in his opinion is necessary for the proper care and management of the property."

It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh. This gentleman was no party to the agreement, and so far as the evidence goes, there is nothing to show that he was even consulted during the negotiations and before the agreement was entered into. It is also quite clear that the Raja of Palganj, although he may be taken to have been throughout a consenting party, had no power to deal with his estate. The learned Judge came to the conclusion that Sir Andrew Fraser, the Lieutenant-Governor of Bengal, had no functions at all in the matter connected with the granting of the lease, that the Commissioner and the Deputy Commissioner were authorized by the rules framed under S. 19 of the Act to sanction leases to be given by the Manager alone, and considered that they could by clear implication dictate terms to the Manager, but could not demise themselves and far less make a binding contract to lease, that the only person authorized to grant a lease under the Act was the Manager and nobody else. Having arrived at that conclusion his judgment proceeds in this way:

"The question therefore resolves itself into this:—Whether the power to lease provided in S. 17 necessarily implies a power in the Manager to contract for it as well."

He then considered the arguments addressed to him on this question and arrived at the conclusion that the power to lease granted by the Act did not necessitate the power to enter into a binding contract to lease. The fact that the latter power had been conferred upon the Manager by the amending Act of 1909 (S. 18-B) indicated to him that before the passing of the amending Act, such power had been excluded and he came to the conclusion that none of the officers who took part in the negotiation was competent to make the agreement in question and therefore that it had no operation in law and he dismissed the suit. It is not very clear from these findings whether the learned Judge dismissed the suit solely on the ground that the Manager

had no power to enter into an executory contract to grant a lease, or whether he also based his decision upon the ground that even if such power existed, the Manager was no party to the agreement. Having arrived at the conclusion that the suit must fail on the ground above referred to, he thought it unnecessary to determine the other issues, but in view of an appeal, he recorded his findings on those issues on the assumption that the agreement in question should be held to be a competent one. He considered that the agreement was a concluded agreement and not a mere negotiation contemplating further steps before it should have a binding effect. He further thought that Sir Andrew Fraser, in bringing about a settlement which involved questions of public policy of considerable magnitude, must be supposed to have been acting in his executive capacity because he had no statutory power to deal with the matter, and that his action was therefore subject to the control of the Government of India; that he had obtained the sanction of the Government of India to settle only the central range, and that his subsequent scheme leasing the whole range was not submitted to or approved by the Government of India who refused to sanction it: that Sir Andrew Fraser was under a misapprehension that the Digambari sect represented the majority of the Jain community and possessed the greater number of shrines on the Hill, which was not the fact, and that he conducted the whole negotiations in an extremely partial manner without inquiring into the preferential rights and privileges of the rival sect of Sitambaris, and that the effect of giving the Hill to the Digambaris would be to put the estate under a disadvantage and to throw the two rival sects into unavoidable conflict to the detriment of the estate. In view of these facts and circumstances he considered that he would not have been prepared to decree specific performance of the contract. On the question of damages he came to the conclusion that assuming there was a binding contract and specific performance was not enforced, damages would have to be allowed only nominally as to the actual amount spent could not be ascertained by the evidence adduced.

By the time the case came on for hearing on appeal before this Court, the Pal-

ganj Estate had ceased to be administered by a manager and the Raja had been restored to the possession and enjoyment of the property under Cl. 12, Chota Nagpur Encumbered Estates Act, a notification to that effect having been published in the Bihar and Orissa Gazette, dated 11th December 1918. The Raja, it appears, was at that time quite prepared to carry out the agreement of 30th November 1908 and grant the appellants a lease on the terms therein mentioned. He accordingly presented a petition, dated 24th February 1919, praying the Court to pass a decree under O. 23, R. 3, Civil P. C., in accordance with the terms arrived at by a compromise between himself and the plaintiffs which terms are set out in the petition. By this compromise the Raja admits the appellants' claim for specific performance of the contract for a perpetual lease of the hill upon the terms and stipulations of the agreement on which the claim is based; the appellants give up their claim for interest, mesne profits, damages and costs, and undertake to bear the costs of all litigation that may arise out of the present litigation as well as the costs of an appeal, if any to His Majesty in Council from the final decree in this case. This application was opposed by learned counsel on behalf of Nagarseth Kasturibhai Manibhai representing the Sitambari Jains, who had been added as a respondent to this appeal under the following circumstances.

In the year 1911 the proprietor of the Nawagarh Zamindari commonly known as the Raja of Nawagarh, instituted a suit against the Raja of Palganj through his manager and guardian Krishna Chandra Ghosh in whom the estate was then vested as defendant, claiming a declaration of title to the southern half of Paresnath Hill. The Raja of Nawagarh, who unlike his neighbour of Palganj is an adherent of the Sitambaris was successful in his suit before the Subordinate Judge of Hazaribagh. An appeal (No. 551 of 1914) was preferred against that judgment to the High Court on behalf of the Raja of Palganj and came before this Court in January 1918. Pending that appeal the Raja of Nawagarh entered into an agreement with a representative of the Sitambaris to grant him or his nominee a permanent lease

of his interest in the hill. The policy of the manager and those associated with him in the management of the Palganj Estate also favoured the transfer of the Raja of Palganj's interest in the hill to the Sitambaris, the Government of India considering that they had preferential claims over their rivals the Digambaris.

In fact, the sanction of the Commissioner of Chota Nagpur had already been obtained on 6th October 1917 under S. 13-B of the Act to transfer the Raja's rights to the Sitambaris. The result was that when the appeal in the Raja of Nawagarh's suit came before this High Court in 1918 the parties to that litigation although disputing as to their respective rights and interests in the hill, were both anxious to transfer those rights whatever the extent of them to the representatives of the Sitambaris who in their turn were apparently prepared to pay each of the contesting parties the price they were willing to accept for a transfer of their respective interests. In these circumstances a purchaser being found who was willing to take over from the disputants their joint interest in the hill without further determination of their respective rights and interests inter se, a compromise was arrived at between them, when the appeal in that suit was partly heard and on 4th February 1918 a compromise petition setting out the terms agreed to by the parties and approved by the Sitambaris was ordered to be filed and the parties were ordered to carry out the terms of the compromise, the appeal standing over for final orders. By the compromise it was provided that both parties should transfer the one by a conveyance and the other by a permanent lease their right, title and interest in Paresnath Hill to the representatives of the Sitambaris upon terms already settled between them; that all questions of ownership and possession of the respective parties should remain undetermined as between the parties; but that in order to settle the extent of the interest to be transferred by the Raja of Nawagarh, the boundary between the Hill and Nawagarh Pargana to the south should be determined by a competent Survey Officer to be appointed by the Court. The conveyance and lease contemplated in the said compromise were then prepared and subsequently executed by Janki Nath

Gupta, who had succeeded Krishna Chandra Ghosh, as Manager of the Palganj Estate and the Rajah of Nawagarh, respectively, transferring their interests in the Hill to Nagarseth Kasturibhai Manibhai in his individual capacity and as representing the Sitambari community of Jains. The Rajah of Palganj was personally opposed to this settlement, and when the matter came again before the Court for final orders on 8th March 1918, he petitioned the Court complaining of the bargain made by the manager on his behalf with the Sitambaris, and asking the Court to recall the order made on 4th February, and not to pass a final decree in the terms of the compromise.

At the same time a similar petition was presented on behalf of the Digambari Jains, who had previously made an unsuccessful application to be added as parties in that suit. The Rajah's petition was rejected both on the ground that he had no control over the management of his estate at that time and also on the merits, he having, it appeared, agreed personally with the Sitambaris on more than one occasion in 1911 and 1913 to grant them a permanent lease of the Hill. The Digambaris' petition was also rejected, although the Court consented to hear them through counsel. The Court then ordered a decree to be passed in the terms of the compromise and ordered the conveyance and lease, copies of which were filed, to be executed and registered. The Court also observed that the terms of the conveyance by the Manager of the Palganj Estate safeguarded the interests of the Digambaris in so far as they provided that the conveyance should be subject to any order which might be passed by this Court in the present appeal. In the same conveyance the purchaser representing the Sitambaris covenanted to take all necessary steps to get his name substituted in place of that of the Raja of Palganj as respondent in the present appeal and, at his own expense, to defend the action and indemnify the vendor and the Palganj Estate against all costs and damages arising out of the litigation after 1st January 1918. The purchaser, after execution of the conveyance, accordingly applied to this Court on 7th August 1918 to have his name substituted in place of that of the Raja of Palganj as respondent, when it was ordered that the name of Nagarseth Kasturibhai Manibhai

be added as a respondent in the appeal, the name of the original respondent being also left on the record.

The question which now arises is whether we ought, in the circumstances just mentioned, to record the compromise of 24th February 1918, and pass a decree in accordance with the terms thereof. The appellants rely upon the provisions of O. 23, R. 3, and say the Court has no option in the matter once the compromise is satisfactorily proved, as in this case, and ought to pass a decree in accordance therewith. They further contend that the respondent Nagarseth Kasturibhai Manibhai is a purchaser pendente lite and takes subject to the rights of the appellants under the decree now asked for.

It is true that the purchase on behalf of the Sitambaris was, by the terms of the conveyance and with the approval of the Court which sanctioned that conveyance, made subject to any order which might be made in the present litigation. It is also true that the doctrine of *lis pendens*, as embodied in S. 52, T. P. Act, applies to transfers during the pendency of a suit even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive agreement entered into with the object of defeating the purchaser. It must be taken that the compromise entered into by the Manager of the Palganj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Raja of Palganj and his estate to the same extent as if the latter had been himself the contracting party. There was therefore an implied obligation on the transferor not to derogate from the grant. It was contemplated also that the purchaser should be substituted in the present appeal as respondent in place of the Raja and indemnify the latter against all liability he might incur by an adverse decision therein. In such circumstances to deny the purchaser the right of defending the present action by setting up any defence that would be open to the Raja of Palganj would be to work a manifest injustice if there is any real defence to the suit. The transfer made to the contesting respondent was made under the authority of the Court within the terms of S. 52, T. P. Act, and one of the terms was that it should

be subject to any order passed in the present appeal.

The object of this was clearly to preserve the existing rights of the Digambaris which were then sub judice, but not to enlarge those rights by putting it in their power to defeat the transfer by a collusive arrangement with the transferee. It seems to us therefore necessary to consider whether the compromise we are now asked to record was a bona fide one or merely colourable with the object of preventing the contesting respondent from setting up such defence to the action as might otherwise be open to the original defendant. It is contended that the compromise is a reasonable one, as the questions to be determined are doubtful and may not end in this Court and the result may be to saddle the Raja of Palganj with heavy costs and possibly damages even if specific performance be not decreed. This argument did not commend itself to us, as there is an undertaking by the purchaser to indemnify the Raja against all liability arising from such a contingency, and it is not suggested that the purchaser's financial resources are inadequate for that purpose. It seemed to us that if there is a real and substantial defence to the claim, the compromise we are asked to record would not in the circumstances already mentioned be a lawful agreement within the meaning of O. 23, R. 3, and without considering the case on the merits we were not prepared to record it and pass a decree in accordance with the terms thereof. We accordingly decided to hear the appeal on the merits.

The main questions which were argued before us were, (1) whether the agreement relied on was made by persons who were competent to deal with the Palganj Estate at all; (2) whether the manager of the estate, assuming him to be a contracting party, had power to enter into an agreement to execute a lease as ancillary to his statutory power to grant a lease; and (3) whether there was a completed agreement upon which a suit for specific performance could be based. These were the points towards which the arguments were mainly directed, but it was further contended by the contesting respondent that the suit, as framed was not maintainable because the alleged contract was made either with the Digambari Jains as a body or with

certain individuals. In the former case no suit was maintainable by the Digambaris, who are not a legal entity. In the latter case the individuals were dead and their legal representatives were not substituted in their place, and even if they claimed as trustees for the Digambaris, there was nothing to show that the substituted plaintiffs were appointed trustees in place of the original plaintiffs.

The first of the above points involves a consideration of some of the provisions of the Chota Nagpur Encumbered Estates Act and in dealing with this question it is necessary to determine who in fact were the actual parties to the agreement. So far as the Raja of Palganj is concerned, he may be taken to have been a consenting party and to have authorized Sir Andrew Fraser to enter into a contract on his behalf, but it is clear from S. 3 of the Act that, so long as the estate was under the control of the manager, the Raja was incompetent to mortgage, charge lease or alienate his immovable property or any part thereof, and his action in the matter may be ignored. According to Sir William Duke's evidence it was Sir Andrew Fraser who directed the whole course of the negotiations, acting on his own responsibility and forming his own decisions. It is also clear from the documentary evidence that the representatives of the Digambaris throughout were treating with Sir Andrew Fraser and, so far as appears from the evidence never once approached the Manager of the Palganj Estate. The reason for this is not far to seek. Sir Andrew Fraser was Lieutenant Governor of Bengal. The matter was one which the Government was likely to consider as involving questions of policy in the government of that Presidency. If the Manager of the Estate had been asked to grant a lease, he would probably have refused to commit himself until he was satisfied that his action in the matter had the approval of the Local Government. The Digambaris, no doubt, felt confident that if they obtained the formal sanction of the Lieutenant-Governor to their scheme the rest was merely a question of routine, and that for all practical purposes the sanction of the Lieutenant Governor meant the consent of the Manager and the consequent grant of the lease. Unfortunately for the appellants however, the Lieutenant-Governor was not himself competent to exercise

the statutory powers vested in the Manager. Had the suit been one against Sir Andrew Fraser for breach of warranty of authority different considerations would arise, which it is not necessary to consider. The suit is against the Raja of Palganj through his Manager, who alone at the material time had power to grant a lease of the property. The management of the estate was vested in the Manager under S. 2 of the Act. His duties are defined in S. 4 and the following sections. They consist mainly in the collection of rents and profits and the disposal of them for certain purposes, which in some cases require the approval of the Commissioner. He must also enquire into and settle debts and liabilities due from the estate, machinery for which is provided involving judicial enquiries with appeals from his decisions in certain cases to the Deputy Commissioner and Commissioner. His powers are enumerated in Part 5 of the Act. They include certain powers connected with his duties, and S. 17 provides ;

"Subject to the rules made under S. 19 the Manager shall have power to demise all or any part of the property under his management for any terms of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon."

Section 18 gives him power in certain cases with the sanction of the Commissioner to raise money by mortgage, sale or loan in order to pay the debts of the holder or charges on the property. S. 18-B, which was enacted after date of the agreement sued on, is set out at length in an earlier part of this judgment. By S. 19 the Lieutenant-Governor may make rules consistent with the Act to regulate certain matters therein specified and generally for the guidance of officers in all matters connected with the enforcement of the Act and such rules, when made, shall have the force of law. R. 5 says :

"Wherever the Manager appointed under the Act is not the Deputy Commissioner of the district, the Deputy Commissioner will (subject to such orders consistent with the provisions of this Act as the Commissioner may from time to time issue) exercise a general control over the management of all the properties in his district."

Rule 16 makes the power of the Manager to grant a lease under S. 17 subject to the sanction of the Commissioner if the lease exceeds a term of four years. The appellants contended that it was impossible to believe that even if the

Manager was not a formal party to the agreement his consent and acquiescence had not been obtained by Sir Andrew Fraser, and that it ought, therefore to be assumed. We are unable to draw any such inference. From the evidence of Sir William Duke as to the manner in which the negotiations were carried through by Sir Andrew Fraser, I think it is much more probable that the manager's opinion was never asked. The only evidence urged in support of this argument consists of two documents which came into existence long after the date of the agreement. The first is a note signed by the Manager and dated 6th February 1909, [Ex. 34 (1)] giving certain information required by the Solicitors with a view to preparing the lease. The second is a letter from Ganga Charan Balav, the Forester of the Palganj Estate, addressed to the Manager, Encumbered Estates, Hazaribagh, dated 25th January 1910, (Ex. 50) stating that the cadastral survey of the Hill had commenced and requesting sanction for two assistants. There is nothing in either of these documents which would warrant the assumption that the Manager had delegated his powers under the Act to Sir Andrew Fraser even assuming he had power to do so which, to say the least, is a violent assumption in the case of statutory powers.

It was next contended that Sir Andrew Fraser, at all events, consulted and discussed the matter, with the Commissioner of Chota Nagpur (Mr. McIntosh) and the Deputy Commissioner of Hazaribagh (Mr. Radice), and, as the Manager was by the rules just mentioned subject to a general control by the Deputy Commissioner and could only grant a lease of this description with the previous sanction of the Commissioner, it was quite sufficient if the consent of these gentlemen should be established. We think it may be assumed from Mr. McIntosh's telegram of 6th November 1908 (Exhibit 21) that he and the Deputy Commissioner assented to the terms eventually arranged between Sir Andrew Fraser and the representatives of the Digambaris. We are unable to hold, however, that because the power to lease vested in the Manager by the Statute requires the sanction of the Commissioner this in itself gives the Commissioner power to grant a lease without consulting the Manager at all, much less that the Com-

missioner may, unknown to the Manager bind him by an agreement compelling him to exercise his statutory powers. It remains to consider whether the Deputy Commissioner, by reason of R. 5 referred to, which imposes upon him the duty to "exercise a general control over the management of all the properties in his district," can, in like circumstances, dispense with the functions of the Manager and himself exercise the powers vested by the Statute in the Manager.

In our opinion such was not the intention of the rule. The Statute contemplates (see S. 9) that the Manager may be either the Deputy Commissioner himself or some one else. In the latter case the powers of the Deputy Commissioner are given by the rule and are confined to a general control over the management of another person. To say that he may treat the Manager as non-existent and exercise his powers himself would, we think, be to extend the scope of the rule beyond its legitimate meaning. S. 21-A gives the Board of Revenue control and supervision over the orders and proceedings of the Commissioner and Deputy Commissioner and affords some light on the meaning of the word control. It could hardly be contended that the Board of Revenue could exercise the functions of the Commissioner. It was lastly contended on this part of the case that the Manager must be taken at least to have ratified the agreement. It is sufficient to say that we have looked in vain for any evidence of ratification. The two documents [Exs. 34 (1) and 50] already referred to were relied on as indicating acquiescence by the Manager and an attitude of mind from which ratification might be inferred. We do not think any such inference can be drawn. It follows from these findings that the plaintiffs' suit must fail and the appeal be dismissed. But as the other two points were argued at some length before us, we think it desirable to record a decision on those points also.

On the second point it was contended for the respondent that the rule whereby equity aids the defective exercise of a power by a tenant for life so as to bind the remainderman can have no application to powers created by Statute. The foundation of the equitable doctrine would appear to be based upon the view that in most cases the donor of the power cannot

have intended that the lack of a seal or the omission of some legal formality not necessarily known to him should defeat the exercise of the power by grantee, if it otherwise expresses the paramount intention of the donor. But to aid the powers granted by Statute for similar reasons would be to treat the Legislature as *inops consilii* (See Farwell on Powers, 3rd Ed. pages 394-5). The appellants contend, however that the rules governing the powers of tenants for life or other limited owners can have no application in a case like the present where the Manager, though appointed by Statute, must be regarded as for the time being in the shoes of the owner, who would undoubtedly have been bound by an executory contract to grant a lease had he remained in control and possession of his estate. This argument, in so far as it denies the analogy between the position of the Manager and that of a tenant for life, has much to commend it. But it appears to us that the decision of the question must depend upon whether a statutory power of leasing can by the canons of construction relating to statutes, be read as including the power to contract to grant a lease. It was contended that such power was a necessary and essential adjunct to the power to grant a lease, and should therefore be read into the statute. It does not appear to us to be essential to the proper exercise of a power to lease that the lessor should also have power to enter into a contract to lease. Even in the case of guardians and managers of minors it has been distinctly laid down by the Judicial Committee that it is not within their competence to bind the minor's estate by a contract for the purchase of immovable property: *Mir Sarwarjan v. Fakhrudin* (1).

The contract in that case was found to be for the benefit of the minor, and it would presumably have been within the by competence of the Manager to purchase. In our opinion the powers granted statute to managers of an encumbered estate should be at least as strictly construed. We are unable to hold that the power to grant leases given to the Manager by S. 17 of the Act included the power to enter into an executory contract like the present, and this question in our

(1) [1912] 39 Cal. 232=39 I. A. 1=13 I. C. 331 (P. C.).

opinion should be decided against the appellants.

The third question is whether there was a completed agreement upon which a suit for specific performance can be based. The terms offered by the appellants on 26th November 1908 were undoubtedly accepted by Sir Andrew Fraser on 30th November. But the respondents contend that the appellants' consent to those terms was conditional and that the conditions were never fulfilled. The conditions were those enumerated in the concluding paragraphs of the latter of 26th November already quoted. The instructions sent to the Government Solicitors on 30th November also show that Sir Andrew Fraser intended those conditions to be complied with although it is noticeable that he treated the Deputy Commissioner of Hazaribagh as the Manager of the Estate, when in fact this was not the case. This misapprehension on his part may account for the fact that the real manager took on part in the negotiations. Another inaccurate statement in the same part of the same letter is that the estate was being managed by the Court of Wards. It seems probable that the appellants were aware on 26th November that an agreement by Sir Andrew Fraser alone might not be sufficient legally to bind the estate, and therefore stipulated that before they themselves should be bound a formal agreement should be prepared and executed by the proper officer authorised to deal with the estate as well as by the Raja of Palganj and lastly, themselves. There is a long series of decisions, beginning with *Ridgway v. Wharton* (2) in 1857 up to modern times, the effect of which is stated by Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg v. Alexander* (3). "It appears to be well settled by the authorities," says that learned Judge:

"that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

(2) [1857] 6 H. L. C. 238.

(3) [1912] 1 Ch. D. 284.

The present case appears to us to fall within the first alternative of the first class of cases considered by Lord Parker, where the law will not enforce the contract because the condition subject to which the consent is given is not fulfilled. For the reasons already mentioned, we think the proper construction of the agreement is that the appellants were quite willing to agree to a lease on the terms mentioned provided the Manager of the estate would execute a formal agreement on those terms. We do not lose sight of the fact that this point only arises on the assumption that the Manager was bound by the acts of Sir Andrew Fraser, a hypothesis which, as already stated, we are unable to accept. But even so the circumstances were peculiar, and whatever may have been the real reason it seems to us that the appellants regarded the execution of the formal agreement by the Manager as a condition precedent to their own consent. That condition has so far been unfulfilled. The formal agreement was never prepared, much less executed by the persons named.

It was argued however that the condition imposed was one introduced in favour of the appellants, and that they would be entitled to waive it, and had in fact waived it as their subsequent conduct in connexion with the survey and other matters showed. The case of *Hawksley v. Outram* (4) was relied on for this proposition. In that case a term was introduced into a contract which was clearly in favour of the purchaser alone. It bound the vendor of a business not to carry on a similar business within a certain radius. It was found to be in restraint of trade and therefore unenforceable. It was held by the Court of appeal that the purchaser in whose favour the clause was interested could waive it and claim performance of the contract omitting the objectionable clause. That case is merely an authority for the proposition that where a completed contract provides for the insertion in a contemplated conveyance or lease of terms which cannot legally be enforced, either party may waive this part of the bargain if those terms are solely for his benefit, and claim specific performance of the rest of the contract. It was not decided upon the question of whether an agreement had been come to but whether a concluded

(4) [1892] 3 Ch. D. 359.

agreement could be enforced. It is difficult to see how the principle there enunciated can be applied to the facts of the present case, where the question is whether there was a completed contract by which both parties were bound. If one party says: "I agree to certain terms provided a certain condition shall hereafter be fulfilled," and the other party consents, in our opinion it does not lie within the competence of either party to waive the condition without the consent of the other. But even if the principle referred to in *Hawksley v. Outram* (4) can apply to a case like the present, we think the condition insisted on by the appellants was not one which was for their benefit alone. This question was considered in *Lloyd v. Nowell* (5). There the plaintiff wrote a memorandum which he signed and sent to the defendant in the following terms:

"Subject to the preparation by my Solicitor and completion of a formal contract, I am willing to sell to you lease of 365 Camden Road, for a term of twenty-eight years at a rent of £110 per annum, you paying me £500 premium for same and also paying the cost of new lease.—£100 paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of January 1895, and possession given on completion. Plants and conservatory flowers to be included in price named."

The defendant on receiving it wrote thereon "Accepted" and subscribed his name. The defendant having afterwards refused to complete, the plaintiff sought specific performance. It was there held that such a stipulation was not for the benefit of the vendor alone. It was equally to the advantage of the purchaser to see and consider the formal contract and to have the position defined before final acceptance. It was further held that the stipulation as to the preparation by the Solicitor and completion of a formal contract was one which was a condition precedent to consent. "That provision," said Kekewich, J:

"seems to me to go to the root of the contract, and not to be such a stipulation as the vendor may waive, for the purpose of insisting on performance of the contract without it."

In our opinion the same reasoning applies with equal force to the present case, and there is in the circumstances which have arisen no complete and binding agreement which can be enforced. It was argued that Sir Andrew Fraser and those associated with him had themselves waived the stipulation by allowing

(5) [1895] 2 Ch. D. 744,

the survey to proceed and allowing the Solicitors to prepare a draft lease. It is sufficient to say we can see no force in this contention. The Solicitors' instructions were to prepare a draft agreement embodying the terms stipulated. Why this was not done, but a draft lease prepared, does not appear, but a perusal of the draft shows that there remained much to be done by way of delimiting the area to be leased. There had already been disputes about the delimitation laid down by the Deputy Commissioner, and it would require more convincing evidence than anything we can find in the record to prove that there was a mutual waiver of any of the stipulations in the agreement.

Whether a suit would lie on behalf of the Digambari sect of Jains by the substituted plaintiffs in a representative capacity it is not necessary, having regard to the above findings, to decide. But it seems to us that it is extremely doubtful whether the Digambaris as a body acquired any right to sue which could be enforced on their behalf by the present plaintiffs under the provisions of O. 1, R. 8. The rule deals with procedure only and creates no substantive rights of suit. The Digambari Jains are not a legal entity. The substituted plaintiffs are not the legal representatives of those with whom the contract was originally made, and, unless it can be shown that all the Digambari Jains individually acquired rights under the contract, a suit brought on their behalf by individuals in a representative capacity would not lie. We do not wish to base our decision on the determination of this question nor is it necessary to do so, but for the reasons already given on the other points we think this appeal should be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 159

MULLICK AND JWALA PRASAD, JJ.

Bisheshar Nath Sahu—Plaintiff—Appellant.

v.

Husani Sao and others—Defendants—Respondents.

Second Appeals Nos. 262 to 268 of 1917, Decided on 25th March 1919, from decision of Dist. Judge, Gaya.

(a) **Bengal Tenancy Act (1885), Ss. 67 and 68—"Bhowli rent" explained—S. 67 has no application to claim for bhowli rent.**

A claim for bhowli rent is in the nature of a claim for damages for breach of contract, but the amount becomes an ascertained amount as soon as the Court has adjudicated upon the claim.

Section 67 applies only to rents which are payable quarterly, and therefore it has no application to a claim for arrears of bhowli rent.

[P 160 C 1, 2]

(b) **Bengal Tenancy Act (1885), S. 67—Interest can be claimed on arrears of bhowli rent apart from S. 67.**

Interest can be claimed on arrears of bhowli rent apart from S. 67 but it is within the discretion of the Court to refuse it having regard to all the circumstances of the case and the conduct of the plaintiff.

[P 161 C 2]

Tribhuban Nath Sahay—for Appellant.

Siva Nandan Rai—for Respondents.

Mullick, J.—All these second appeals have been preferred by the plaintiff. The learned District Judge finds that the Record of Rights has not been rebutted and that the enhancements claimed by the plaintiff were not accepted by the defendants. The finding that the Record of Rights has not been rebutted is attacked on the ground that the learned District Judge is wrong in saying that the landlord's seha papers have not been properly proved. It appears however that what the learned District Judge means is that there is no evidence that the amounts entered in these papers were ever collected. The papers have been proved to be in the handwriting of a certain patwari and there is no defect as to formal proof, but the learned District Judge meant and has found that the evidence as to collection is wanting. This is evidently his meaning, although the learned District Judge has perhaps not expressed himself as clearly as he might have.

The next objection is that interest should have been allowed. On behalf of the respondents it is contended that as bhowli rents are not ascertained rents interest under S. 67, Ben. Ten. Act, is not claimable, and reliance is placed upon *Raja Rangayya Appa Rao Bahadur v. Bobba Sriramulu* (1) and on *Apurba Krishna Roy v. Ashutosh Dutt* (2). In my opinion these authorities do not apply. Although there is some force in the contention that a claim for bhowli rents is in the nature of a claim for damages for breach of contract, there is authority in this Court for the proposi-

tion that the amount becomes an ascertained amount as soon as the Court has adjudicated upon the claim. But the ground upon which the claim for interest must fail here is that S. 67, Ben. T. Act, applies only to rents which are payable quarterly. It does not apply to bhowli rents which, as in this case, are not so payable; and so it was held by their Lordships of the Privy Council in *Hemanta Kumari Debi v. Jagadindra Nath Roy* (3). The Court might no doubt have allowed interest under the Interest Act, but the claim here is not put on that ground. As to the claim for damages, S. 68, unlike S. 67, is not restrictive. But the trial Court has found that the plaintiff by claiming the lands as Chakat and by grossly exaggerating his claim has rendered himself incompetent to claim the benefit of the section. The District Judge apparently agrees and in a matter of discretion we cannot interfere in second appeal. The decree of the learned District Judge is therefore correct and the appeals must be dismissed with costs.

Jwala Prasad, J.—I agree that the plaintiff has failed to rebut the entries in the Record of Rights. The only substantial question for determination in these appeals is whether the plaintiff is entitled to interest or damages in respect of the bhowli rent found by the Courts below to be due from the defendants. The landlord's suit relates to the bhowli rent for the years 1321 and 1322 Fasli, payable under the batai system, whereby the landlord is entitled to divide the produce of the land with the tenant and to receive his portion thereof as rent; and under S. 71 (2) the tenant is not entitled to remove any portion of the produce from the threshing floor at such a time or in such a manner as to prevent the due division thereof at the proper time. The produce consisted of two crops in the month of Magh and Baisakh respectively in each of the years, and it is clearly stated in para. 13 of the plaint that those were the months when the grains became payable in each of the years but were not paid to the plaintiff. This statement in the plaint is not at all denied or controverted in any way in the written statement. The bhowli rents therefore were payable at two periods constituting two instalments, namely Magh and Baisakh of each year, and on

(1) [1904] 27 Mad. 143=31 I. A. 17 (P. C.).

(2) [1906] 9 C. W. N. 122.

(3) [1895] 22 Cal. 214=21 I. A. 131 (P. C.).

default of payment they became arrears of rent from the expiry of the said dates of payment. The claim for interest cannot be entertained under S. 67, Ben. Ten. Act, which, as held by their Lordships of the Privy Council in *Hemanta Kumari Dabi v. Jagadindra Nath Roy* (3), only applies to cases where the rent is paid quarterly. The plaintiff therefore cannot claim the benefit of S. 67, which makes it compulsory for the Court to award interest unless damage is awarded under S. 68. In the aforesaid authority their Lordships, while holding that S. 67 did not apply to rents payable monthly, allowed interest to be calculated monthly and observed as follows:

"Here it is not disputed that the rent is payable monthly, and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly".

On this principle the plaintiff would have been entitled to interest to be calculated from the said periods, viz., Magh and Baisakh of each year. It was held in *Govindan Nair v. Cheral* (4) that a debt payable in grain is a debt within the meaning of Act 32 of 1839 and that interest is allowable on the same. Their Lordships observed as follows:

"We fail to see why a debt which is specifically expressed in measures of grain and payable at a specified time should not be regarded as a debt certain (assuming the latter adjective in S. 1 of the Act to qualify the word 'debt' as well as 'sum'), merely because the commutation rate at the time of payment or suit may have to be subsequently determined."

Interest is given under Act 32 of 1839 by way of damages on the ground that a debtor has wrongfully refused to pay or withheld the money payable by him: *Rajnarain Bose v. Universal Life Assurance Co.* (5). Under S. 73, Contract Act, the landlord would be entitled to compensation for any loss or damage caused to him which naturally arose in the usual course of things from the breach or which the parties knew when they made the contract to be likely to result from a breach of it. It has been shown in an elaborate judgment by Chandavarkar, J., in the case of *Saunadanappa v. Shivbasawa* (6) that, according to the Hindu law, a default on the part of a debtor to pay his debt after demand of payment necessarily causes loss to the creditor. This loss is measured both under the

Contract Act as well as under the Hindu law by the amount of interest which the creditor could have earned if the money had not been wrongfully withheld. In this view also, the last words of S. 1, Interest Act:

"provided the interest shall be payable in all cases it is now payable by law,"

would seem to entitle the landlord to interest for the bhowli rent which was withheld from him at the right time and which on account of the default of the defendants ripened into an arrear of rent or a debt, as is deducible from the decision of their Lordships of the Privy Council in the case of *Hurroopersaud Roy v. Shamapersaud Roy* (7), where interest on mesne profits was held allowable from the date of the suit in a decree on the ground of the law and practice that existed at the time when the Interest Act came into operation. The share of the plaintiff in the produce of the grain as his rent was well known and also the time for the payment of it was certain, namely, Magh and Baisakh of each of the years in suit. The amount in money which the defendants ought to have paid to the plaintiff becomes an ascertained amount as soon as the Court has adjudicated upon the claim. As a matter of practice, interest is generally allowed on bhowli rent and only recently I came across a case where interest was allowed. The plaintiff would have been entitled to interest provided the defendants had withheld the payment of rent without any reasonable and probable cause. It is clear however from the judgment of the trying Court that on account of disputes that existed between the parties and because portions of the bhowli rents were claimed by the plaintiff as being chakat, it is not likely that the plaintiff himself would have realised produce from the defendants in the midst of the dispute. In this view and also because the claim of the plaintiff was excessive, the Courts below refused to award any damages to the plaintiff under S. 68 Ben. Ten. Act, and the Courts were obviously right in using the discretion vested in them under that section, the object of which is to award a high rate of damages, namely, up to 25 per cent, in order to prevent a tenant from withholding the rent from the landlord. We cannot therefore in second appeal interfere with the dis-

(4) [1915] 38 Mad. 464=30 I. C. 432.

(5) [1881] 7 Cal. 594.

(6) [1907] 31 Bom. 354.

(7) [1877-78] 3 Cal 654=5 I. A. 31 (P. C.).

cretion of the Court below in refusing to award damages. The award of interest is also discretionary as held by Chandavarkar, J., in *Piraji v. Ganpati* (8). The reason therefore for refusing damages would in this case equally apply for refusing interest to the plaintiff. The plaintiff is therefore not entitled to damages or interest in this case. I therefore agree that the appeals should be dismissed.

V.S./R.K., *Appeals dismissed.*

(8) [1910] 34 Bom. 502=6 I. C. 527.

A. I. R. 1919 Patna 162

JWALA PRASAD, J.

Sakallati Misrain—Appellant.

v.

Munshi Mander—Respondents.

Appeal No. 723 of 1917, Decided on 11th June 1918, from appellate decree of Dist. Judge, Bhagalpore, D/- 13th June 1916.

(a) Civil P.C. (5 of 1908), O. 8, R. 5—**Plaint allegations not denied specifically or by necessary implication—Admission should be presumed.**

Where an allegation in a plaint is not denied specifically or by necessary implication, it must be deemed to have been admitted and the plaintiff is not bound to prove it by evidence, unless required by the Court to do so. [P 162 C 2]

(b) Civil P. C. (5 of 1908), O. 41, R. 31—**Judgment of appellate Court must contain discussion of evidence on record.**

The judgment of an appellate Court must show that the Judge has considered the evidence in the case himself and has come to a finding upon an independent consideration of the facts and circumstances and the evidence in the case.

Where the judgment of an appellate Court was as follows:

"In the original Court the plaintiff claimed arrears of bhaoli rent. The learned Munsif did not find the claim proved. I do not think the evidence is of such a nature as to show that the Munsif was wrong. The appeal is dismissed with costs."

Held: that the judgment was not in accordance with law and must be set aside. [P 162 C 2]

Nirsu Narain Sinha—for Appellant.

Judgment—This is an appeal against the judgment of the District Judge of Bhagalpore, dated 13th June 1916. The appellate Court's judgment is as follows:

"In the original Court the plaintiff claimed arrears of bhaoli rent. The learned Munsif did not find the claim proved. I do not think the evidence is of such a nature as to show that the Munsif was wrong. The appeal is dismissed with costs."

I do not think that the aforesaid judgment is at all in accordance with law; it does not show that the learned District Judge has considered the evidence in the case himself and has come to a

finding upon an independent consideration of the facts and circumstances and the evidence in the case. He does not even find that the Munsif is right in his appreciation of the evidence, but simply disposes of it in a summary fashion by the remark that the evidence is of such a nature that he does not think that the Munsif was wrong. This ground is alone sufficient to set aside the judgment of the Court below and to remand the case for a rehearing and to come to a definite finding upon the points involved in the case on a consideration of the pleadings and the evidence: *Mubarak Hussain v. Syed Shah Hamid Hussain* (1) and *Laloo Singh v. Tahbal Gope* (2). Looking into the judgment of the Munsif it appears to me that he was under a misconception as to the true scope of the pleading and the nature of the evidence required on behalf of the plaintiff. The plaintiff's claim was for bhaoli rent for the years 1319—1321 in respect of the lands in dispute. In the survey Record of Rights the said lands were recorded as "batai nisf." The record was finally published on 15th September 1901. The plaintiff in his plaint has referred to the entry in the survey and has based his claim upon that entry. In para. 7 of the plaint he has claimed Rs. 210 as rent and cesses and interest as per account given in the schedule to the plaint. The plaint and the schedule have been verified by the plaintiff. In the written statement filed by the defendant the entry in the survey Record of Rights is not disputed, but it is said that subsequent to that

"in the year 1314 the plaintiff settled with the defendant's son Bhujander Mander 4 bigha of land at the rate of Re. 1-8-0 per bigha on an annual jama of Rs. 6 exclusive of cesses."

The defendant does not challenge the account of the produce given in the plaint. Under the new R. 5 in O. 8, Civil P. C., the allegation in the plaint regarding the account appended thereto and as to the defendant not having paid to the plaintiff the rents for the years in suit, "if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted."

The effect of this rule is to relieve the plaintiff from the obligation to prove all the facts and allegations made in support of his claim. The rule is ex-

(1) [1917] 2 Pat. L. J. 8=38 I. C. 509.

(2) [1917] 38 I. C. 814.

actly in accordance with S. 58, Evidence Act, which says that

"no fact need be proved in any proceeding which the parties . . . or their agents agree to admit at the hearing . . . or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings."

In considering the pleadings in the case it is clear that the presumption of the survey entry was in his favour as regards the nature of the holding in question and as regards the amount claimed as rent due from the defendant, he was not required to prove it unless under the proviso to the new rule, as well as to that in S. 58, Evidence Act, the Court in its discretion required him to prove it otherwise than by an admission in the pleadings of the defendant. It does not appear from the order sheet or from the judgment that the Court had required the plaintiff to prove that. No doubt the plaintiff offered to give evidence and examine the patwari upon the point. The Courts below have therefore to my mind misconceived the pleadings and the nature of the evidence that had to be given in the case. The defendant after filing his written statement, as has been said above, did not deny the correctness of the account given by the plaintiff; he did not appear in Court and contest the claim of the plaintiff, and he has not appeared either in the appellate Court or in this Court. This circumstance might also have to be considered as to the bona fides and correctness of the claim of the plaintiff. It does not appear from the judgment of the learned Munsif that he considered the evidence of the patwari in the case. Of course the learned District Judge did not consider it at all. The result is that the case must be remanded to the Court below to come to a definite finding in view of the remarks made above as to whether the plaintiff is entitled to the claim laid by him in the plaint.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 163

ATKINSON AND MANUK, JJ.

Chattu Singh and others—Appellants.

v.

Radha Kishun and others—Respondents.

Appeals Nos. 676 and 768 to 772 of 1917, Decided on 3rd February 1919, from appellate decree of Sub-Judge, Muzaffarpore, D/- 23rd March 1917.

Decree—Setting aside—Fraud—Ex parte decree passed—Subject-matter of suit found not to be in existence—Decree being fraudulent, Court can set it aside.

If the subject-matter of a suit exists and a decree is obtained in respect thereof against another by means of false and perjured evidence, that per se is not sufficient to justify a Court to set aside the decree so obtained. If however a person invokes the jurisdiction of a Court of Justice upon a claim in respect of a certain subject-matter and he obtains a decree as against another in respect of that subject-matter, but it appears that that subject-matter in truth and in fact had no existence at all, then the decree so obtained is a decree fraudulently obtained not only as against the person against whom it has been procured but upon the Court that he induced to take cognizance of the claim and grant relief on the assumption that the subject-matter existed. If the Court comes to know that the subject-matter in respect of which it gave the decree had no existence in fact, then it would be justified in setting aside that decree, even though it be its own decree, on the ground that it was fraudulently procured. [P 164 C 1,2]

*Shiveshwar Dayal—*for Appellants.

*Bunwari Lal—*for Respondents.

Judgment.—These six appeals come before us, in second appeal, from a decision of the Subordinate Judge of Muzaffarpore. The appeals are numbered 676, 768, 769, 770, 771 and 772 of 1917. The plaintiffs are a batch of tenants who seek in these suits to set aside decrees obtained against them for rent by the defendants in respect of certain diara lands; and which decrees were obtained in the year 1911. The defendants in the rent suits filed written statements; but at the hearing of the suits they did not appear; accordingly the landlord, the plaintiff in the rent suits, obtained decrees without contest as against the defendants, the tenants. The defendants contend that they did not appear by reason of the fact that a compromise had been come to between themselves and their landlord, and that the landlord had in breach of faith failed to act upon the compromise by not informing the Court of its existence.

The defendants in the rent suits sought to have the rent decrees obtained against them set aside by an application under O. 9, R. 13. That application however failed, and the plaintiffs in this suit, the defendants in the rent suits, were consequently obliged to bring the present action for the purpose of having the rent decrees which had been obtained against them set aside, alleging that the previous rent decrees had been fraudulently procured. The fraud upon which the plain-

tiffs rely to have the rent decree set aside is twofold in character, namely, the non-existence of the lands alleged to form the subject-matter of the letting between the defendant, as landlord, and the plaintiffs, as tenants, and the non-existence of the making of any contract of letting in respect of the lands for which rent was sought to be recovered by the defendant against the present plaintiffs, and by reason whereof the Court was falsely induced to award a decree for rent to the plaintiff in the previous rent suits.

The determination of these issues is one of fact, and the only question which we have to consider in second appeal is whether upon the evidence it was open to the learned Munsif to find in law that neither the lands existed forming the subject-matter of the alleged letting nor that a contract of tenancy was ever made or existed between the plaintiffs and the defendant in respect of the lands for which rent was claimed. This being so, we have to determine whether upon the evidence adduced at the trial in the original suits, out of which these second appeals arise, the learned Munsif was warranted in law in setting aside the rent decrees originally obtained as having been obtained by fraud. The learned Subordinate Judge in first appeal has not considered or inquired into the merits of any of the appeals presented before him. He merely said, that even accepting the findings of facts arrived at by the learned Munsif, the rent decrees obtained in 1911 could not be set aside in point of law, on the ground of frauds. With great respect to the learned Subordinate Judge he was clearly wrong, in the conclusion of law at which he has arrived, and he has mixed up the difference between two distinct and separate legal considerations.

No doubt, if the subject-matter of a suit exists, and a decree is obtained in respect thereof against another by means of false and perjured evidence, that per se is not sufficient to justify a Court setting aside a decree so obtained. But if a person invokes the jurisdiction of a Court of Justice upon a claim in respect of a certain subject-matter, and he obtains a decree as against another in respect of that subject-matter; but which subject-matter in truth and in fact had no existence at all, then the decree so

obtained is a decree fraudulently obtained not only as against the person against whom it has been procured but upon the Court that he induces to take cognizance of the claim and grant relief, on the assumption that the subject-matter existed. If a Court comes to know that the subject-matter in respect of which a suit was based and in respect of which it gave a decree had no existence in fact then I apprehend in law a Court of Justice would be entitled to set aside such a decree, even though it be its own decree, on the ground that it was fraudulently procured.

The law applicable to such cases has been laid down clearly and definitely. The learned judgment of Sir Lawrence Jenkins in *Nandu Kumar Howladar v. Ramjiban Howladar* (1) has been followed and assented to in this Court in the case of *Mohan Krishna Dar v. Har Prasad* (2), and we see no reason at all to dissent from the more recent decision reported as *Kasiswar Goswami v. Amiruddin* (3), which is clearly distinguishable in its facts from the present case. All that remains for us to consider is, whether the learned Munsif, having found as a fact that no lands existed in respect of which a letting could have been made and also that no contract was ever made to support the creation of a tenancy as between the landlord and tenants, was justified in law in setting aside the rent decrees obtained as against the plaintiffs without contest in the rent suits of 1911. Clearly he was. The evidence adduced in this case was such as, in our opinion, would have justified the Munsif in arriving in law at the conclusion that he did.

It must always be remembered that the degree of fraud necessary to justify a Court setting aside a decree varies according to the method and manner in which a decree has been obtained, that is to say, where the decree was obtained (a) by consent, (b) ex parte, (c) after contest. In this case the rent decrees were obtained in a sense ex parte, or at least without contest; and the Court that issued the rent decrees never inquired into the propriety of the claim, and by a fraud was misled into granting the relief claimed.

(1) A. I. R. 1914 Cal. 232=41 Cal. 990=23 I.C. 337.

(2) [1917] 40 I. C. 2.

(3) [1918] 47 I. C. 14.

For these reasons it appears to us that the learned Subordinate Judge, in first appeal, was wrong in the conclusion at which he arrived; and it becomes necessary to remand the case to him for final determination on the merits. We shall avoid making any reference to the merits of the case; because by the terms of our order the whole case will be remanded for disposal on the merits. Accordingly we will reverse the order of the learned Subordinate Judge and allow the appeals with costs in Second Appeals No. 676 of 1917, but no costs in the analogous cases, and we remand all the cases back to the Subordinate Judge for final adjudication and disposal according to law on the facts and merits.

V.S./R.K.

Appeals allowed.

* A. I. R. 1919 Patna 165

DAWSON-MILLER, C. J. AND ADAMI, J.

Mahabir Prasad —Plaintiff — Appellant.

v.

Darbhangi Thakur —Defendant—Respondent.

Letters Patent Appeal No. 107 of 1917, Decided on 17th June 1919, from decision of Mullick, J. D/- 21st July 1917, reported in 41 I. C. 522.

(a) Practice—Relief — Plaintiff failing to prove his case—Defendant will succeed even if facts are capable of proof to knowledge of defendant.

There is nothing wrong in a defendant putting the plaintiff to proof of the facts necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant. [P 168 C 1]

(b) Tort— Joint tortfeasors—Rule of non-contribution applies between joint tortfeasors only if parties are wrongdoers.

The rule of non-contribution between joint tortfeasors exists in this country, but it applies only in cases where the parties are wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. [P 168 C 2]

***(c) Tort—Joint tortfeasors—Several defendants jointly setting up defence knowing not substantial—Costs decreed against them jointly—Defendant paying costs is entitled to claim contribution.**

Where several defendants, jointly and in collusion with each other, set up a defence which they know cannot be substantiated in fact and which fails and costs are decreed against them jointly, there is a right of contribution in favour of the defendant who discharges the joint liability for costs under the decree. Case Law discussed.

[P 169 C 1 P 171 C 1]

Kulwant Sahay and *Rajendra Prasad* —for Appellant.

Hasan Jan—for Respondent.

Dawson-Miller, C. J.—This is an appeal by the defendant under Cl. 10, Letters Patent, against a judgment of Mullick, J., dated 21st May 1917: *Darbhangi Thakur v. Mahabir Prasad* (1). All the parties in the present suit together with Mt. Bhagbati Kuer are the owners of Mouza Rahmatpur. The respondent, who is the plaintiff in the suit, wished to have a partition of the estate and instituted batwara proceedings before the Collector under the Estates Partition Act for that purpose. Some of the defendants supported him, but Bhagbati Kuer entered an objection which the Collector disallowed and ordered the batwara to proceed. Bhagbati Kuer and another of the cosharers thereupon instituted a title suit in the civil Court before the Subordinate Judge of Darbhanga impleading the respondent and the appellant and other defendants in the present suit, claiming a declaration that by reason of a previous private partition which still subsisted the mouza was not liable to be again partitioned. Both the appellant and the respondent and some 8 other defendants in the present suit contested the claim, pleading amongst other defences that there had been no previous partition. Their defence failed and on 27th April 1914 Bhagbati Kuer's suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and the costs were recovered against the respondent alone. He thereafter instituted the present suit to recover from his co-defendants their proportionate share of the costs recovered from him under the decree of 27th April 1914. The appellant alone resisted the claim, the other defendants allowing judgment to go against them by default.

Apart from the question which I shall presently consider, I think it is clear that the case is one where there was a common liability on the parties and where the equitable doctrine of contribution applies in favour of the person compelled by legal process to discharge the common liability. The defence of the appellant to the present action was that the respondent, although he knew there

(1) [1917] 41 I. C. 522.

had been a previous private partition, persuaded the appellant to join with him and others in filing a joint written statement in Bhagbati Kuer's suit raising, amongst other defences, that there had been no previous partition, although they both knew the contrary to be the fact and that the respondent promised to indemnify him against any costs that might be incurred in that suit. No defence was raised that contribution could not be claimed by reason of the parties being joint tortfeasors. Before the Munsif however the issues raised were: (1) Were the plaintiff and defendants joint wrongdoers in so far as the defence in the title suit was concerned? If so, is the suit maintainable? (2) Did the plaintiff contract with defendants to meet expenses of the title suit in consideration of the defendants' helping him with witnesses? If so, is plaintiff estopped from suing for contribution? (3) To what relief is plaintiff entitled? On the second of the above issues the Munsif found that no such contract as that relied on by the appellant had been entered into. On issue 1 he took the view that the defence raised in the previous action was not a bona fide defence because the respondent as well as the appellant knew that the mouza had previously been partitioned into separate pattis. His judgment on this issue was as follows:

"The leading case on this point is the ruling reported as *Suput Singh v. Imrit Tewari* (2). Taken as a proposition of law the plaintiff's pleader admits it to be binding on this Court. His contention however is that his defence in the title suit was not false and that it was a bona fide defence which proved to be wrong. I do not agree with him on this point. The title suit was instituted by Bhagbati Kuer as plaintiff put in a petition for partition before the Collector. Defendant 7 did not join the plaintiff in this petition. In the civil suit the main question of fact was as to the existence of pattis (as Ex. 1 shows). Now the plaintiff knew and ought to have known that his act in filing the petition for partition was wrong. And he certainly knew or ought to have known the existence of the pattis. His action therefore in denying the existence of pattis and in resisting the suit on that ground mainly was also wrong. His deed of purchase makes mention of pattis (vide Ex. 6) and he admits in this suit that he was aware that pattis did exist in the village. It is clear therefore that his initial act which gave rise to the suit and his defence which resulted in the accumulation of costs were all wrongful to the knowledge of the plaintiff and of defendant 7 (the present appellant), who of course admits knowledge of all these facts. The case is therefore governed by the principle laid down in the

ruling quoted above and plaintiff and defendant 7 being joint wrongdoers, this suit for contribution will not lie and I hold accordingly."

From this judgment the respondent appealed to the Additional Subordinate Judge, who dismissed the appeal being of opinion that the appellant and respondent were joint wrongdoers by reason of having set up a defence which they knew to be untrue. The evidence before the Court was mainly documentary, showing that a private partition had taken place a long time ago and that several co-sharers had separate pattis. A copy of the judgment of 27th April 1914 was also exhibited. The only oral evidence given at the trial was that of the respondent himself and of Kuldip Saha, the appellant's patwari. The Subordinate Judge found that the judgment of 27th April 1914 showed that the respondent and the appellant had denied in that suit that there had been a private partition, although they must have known that the contrary was the fact. From the evidence of the respondent in the present suit it appears that he frankly admitted that there had been a private partition many years ago before he acquired an interest in the property but said that it was Kutcha. The meaning of this clearly is that he thought the previous partition was either of an informal character or that it otherwise failed to comply with the provisions of S. 7, Estates Partition Act, in which case it would not be such a partition as would debar the Collector from proceeding with the batwara proceedings which the respondent had instituted. The truth is that the question of the existence of a previous partition is a mixed question of law and fact, and there is nothing reprehensible in such circumstances in denying the existence of a previous partition even if it is known that the estate has been divided into separate pattis. As the question has been raised as to the exact nature of the findings of the Subordinate Judge, it is desirable that I should set out at length that part of his judgment which deals with this question. He says:

"Now the judgment (Ex. 1) shows that both the appellant and the respondent Mahabir denied the existence of a previous private partition altogether, but the fact that the denial was false to their knowledge is indicated by the statement made by the appellant himself in this case. He has the good sense to tell us in this case that there actually existed a private partition from

before he acquired a proprietary interest in Mouza Rahmatpur long ago, but he adds that the partition was Kutchi. But whether the partition was Kutchi or not, the fact remains that there was a partition and that each proprietor or set of proprietors was in exclusive possession of separate pattis to the knowledge of the appellant, and so there can be no room for doubt that the total denial of the existence of a private partition was false to the knowledge of the appellant and the respondent. Matters might have stood on a different footing if the appellant had admitted the existence of the private partition and merely pleaded that it was effected without the intervention of a Court or was somehow incomplete or informal. Then it will be observed that the appellant admittedly moved the Collector for partition and though the respondent did not join with him in doing so, he too approached the Collector for partition shortly after and both of them resisted when Bhagbati Kuer pleaded before the Collector and before the District Judge that there was a private partition and that the Mouza was not on that account liable to be partitioned. It seems to me therefore that this attempt to get the Mouza partitioned and to do away with the private partition was made by the appellant in concert with the respondent. It is true there is no direct evidence of appellant's colluding with respondent to set up a false defence. The circumstances disclosed strongly argue in favour of such a collusion. In such circumstances I am inclined to agree with the learned Munsif and to hold with him that the appellant and the respondent were joint wrongdoers and that the appellant cannot maintain a suit for contribution against him. In the result the appeal fails and is dismissed. I make no order for costs."

Before dealing with the effect of these findings, it is desirable that I should state how the matter was dealt with by the learned Judge of this Court when the case came before him on appeal and from whose judgment the present appeal is brought. He was of opinion that even if the decision of the lower Court amounted to a finding that the plaintiff and the respondent conspired to put forward and maintain a false defence in the previous suit, this would not amount to an actionable wrong for which damages might have been recovered by the plaintiff in that suit, as he would be amply indemnified against such collusive acts by the award of costs. He was of opinion that the rule prohibiting contribution between joint tort-feasors was recognized in India, but that in the present case there was no actionable wrong to which the plaintiff and the defendants were parties and that even if the findings of the lower appellate Court were such as he, for the purposes of his judgment, assumed them to be still there was no reason why contribution in this case should not be al-

lowed. At the same time he thought that if his view of the law were wrong, it might be necessary to remand the case to the lower Court for further findings.

In the view I take of the findings of the lower Court it is unnecessary to determine how far the learned Judge of this Court was justified in the view he took of the legal aspect of the case. I have quoted above the judgment of the Subordinate Judge at length, because it is contended that the finding is that the respondent and the appellant not only set up a false case in their written statement by way of defence to Bhagbati Kuer's suit, but conspired together to do so and then gave false evidence in support of it as part of the conspiracy. If that were indeed the finding, it might be that the Court would not assist either party in such a conspiracy to recover from the other a contribution towards the costs incurred as the result of setting up what they knew to be a false defence and supporting it by perjury in the witness-box. But I cannot read into this judgment any intention to arrive at such a conclusion. The learned Judge finds that there is no direct evidence of the appellant colluding with the respondent to set up a false defence but agrees with the Munsif that they were joint wrongdoers.

The earlier part of his judgment, in which he finds that the total denial of the existence of a private partition was false to the knowledge of the appellant and the respondent, must refer not to oral evidence given at the trial in the title suit of which there is no evidence, but to the defence pleaded in the written statement. The appellant in fact gave no evidence in that suit. This view is further borne out by the concluding passage of the first paragraph, where he refers to the matters pleaded. But in order to satisfy ourselves and obviate the necessity of a remand, we have looked at the evidence given in this case and there is not a word either in the oral evidence of the only two witnesses called or in the judgment in the title suit (Ex. 1) which could possibly justify a finding that there was a conspiracy such as that suggested or that the respondent gave perjured evidence. It appears from Ex. 1 that the issue framed on this question was:

"whether Mouza Rahmatpur, Tauzi No. 4058, has been completely and formally privately partitioned as alleged by the plaintiff."

In dealing with that issue the District Judge in that judgment says:

"The defence relies upon S. 7, and argues that the admissions in the plaint that the lands included in Khewat 1/20 are joint disproves the fact of a complete and formal partition."

He then deals at length with a number of documents and comes to the conclusion that they establish a private partition many years ago. The only witness whose evidence is referred to is one Jena Raut, who denied ever having heard of the pattis although his vendor's Khewat mentions them. The learned Judge says this shows the unreliable nature of the defence evidence. This witness is apparently singled out as one who went to great lengths but the respondent's evidence is not mentioned nor is there anything from which it can be inferred that he gave false evidence. The respondent in his evidence in the present suit admitted he knew of the existence of separate pattis but contended that they only indicated what he calls a Kutcha partition, and there is nothing to show that he gave evidence inconsistent with this in the title suit. It would be useless therefore to remand this case which was instituted four years ago for findings on a point which on the evidence could only be decided in the respondent's favour. It must be taken that the finding of the Subordinate Judge that the appellant and respondent 'were jointwrongdoers is based on the fact that by their written statement they denied the existence of an earlier formal private partition. As already pointed out, this is a mixed question of law and fact and was a perfectly legitimate plea. In any case there is nothing wrong in a defendant putting the plaintiff to proof of the fact necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant. To hold that it is a tort for the defendant by his pleadings to deny a fact which he knows to be true even if he has no evidence to the contrary, is a proposition which cannot be supported on any known principle of law. It follows therefore that on the facts found by the lower Court the par-

ties were not 'wrongdoers in the sense which would debar contribution between them. The case of *Surput Singh v. Imrit Tewari* (2) relied on by the Munsif is certainly no authority for the proposition that there is no right of contribution between joint defendants in respect to the costs awarded against them and paid by one of them in an action in which they knew that the facts pleaded in the defence could not be established. The costs in that case were awarded against the plaintiff and the defendant in an action for tort, the tort consisting in cutting down trees, the property of the plaintiff, in the original suit.

The only question for consideration was whether notwithstanding that the original suit was grounded in tort, the defendants were wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act or whether the acts complained of were not in fact committed under a bona fide claim of right. The case was remanded for findings upon this point, but so far from establishing the appellant's contention it recognizes that there may in certain cases be contribution even between tort-feasors. This also was the view of Lord Herschell, L. C., and Lord Waston in *Palmer v. Wick Steam Shipping Co., Ltd.* (3), in which the former expressed the view that although it was now too late to question the decision in *Merryweather v. Nixan*, (4), it did not appear to be founded on any principle of justice or equity which would justify its extension to the jurisprudence of other countries. That the rule of non-contribution between joint tort-feasors exists in India cannot, I think, be questioned, but the authorities appear to show that it ought only to apply in cases where the parties are wrongdoers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act: *Sreeputty Roy v. Laharam Roy* (5). In the case now under consideration the act relied on by the appellant is the setting up of a defence to a suit which the defendants in that suit knew could not be substantiated in fact and that they combined together for that purpose. This was, in my opinion, a perfectly legitimate act for the reasons

(3) [1894] A. C. 318.

(4) [1799] 8 T. R. 186.

(5) [1867] 7 W. R. 384.

already given and it is an abuse of language to describe a combination for the purpose of carrying out a lawful act as collusion or conspiracy. Nor are we concerned in any way with the motives which influenced that action. They may have been malicious or they may have been morally unimpeachable, but in neither case would the Court be justified in treating as a tort that which was not legally wrongful. Viewed from this standpoint I agree with the conclusions arrived at by the learned Judge of this Court, although I think he expressed the legal principle upon which he acted in language of too wide import which, if taken as of general application and apart from the facts of this case, may be misleading. He says that a conspiracy to put forward and maintain a false defence is not a wrong for which the law allows a remedy by an action for damages. If this is limited to a defence put forward by the pleadings I agree with the proposition intended to be laid down, but the word "conspiracy" does not appear to me to be an apt term for expressing such a case. Indeed the language used might lead to the conclusion that it was not a wrongful act to conspire together to commit perjury in support of a defence known to be unsupportable, which would in itself be a crime.

Certain cases were relied on by the appellant in support of the contention that where two defendants have jointly, and in collusion with each other set up a false defence which has failed and costs have been decreed against them jointly, there is no right of contribution by the one who has discharged the joint liability for costs under the decree. The first case is that of *Vayangara Vadaka Vittil Manja v. Kadugochen* (6). It does not appear from the report whether the costs were incurred in an action for tort or not. The Munsif found that the costs awarded were in the nature of a fine as compensation for damages and dismissed the suit. The High Court found that the plaintiff was in fact the real defendant in the former suit and that the defendant was merely a kanomdar and further that they colluded together in order to defeat the plaintiff in the previous suit. They considered that they were bound by the principles laid down in the case of *Suprut Singh v. Imrit Tewari* (2) (ubi sup.) and that the plaintiff was not entitled to

(6) [1884] 7 Mad. 89.

contribution from the defendant. The judgment appears to have been based upon the fact that the plaintiff was the real defendant and that the defendant was not directly interested in the previous suit, but it recognized the general rule as to contribution between joint defendants for costs paid by one of them.

The case of *Gobind Chunder Nundy v. Srigobind Chowdhry* (7) appears to have gone somewhat further. It was found that the plaintiff and defendant had combined together in a former suit to defeat the plaintiffs in that suit and with that object they put in false defences. The learned Judges relied upon the case of *Vayangara Vadaka Vittil Manja v. Kadugochen* (6) (ubi sup.) for the proposition that where the plaintiff colluded with the defendant in a former suit to endeavour to defeat the plaintiffs there, and was made liable for costs, no suit for contribution in respect to such costs would lie, and remanded the case to the lower Court for further findings. If it was the intention of the learned Judges in that case to lay down a rule that contribution cannot be recovered between co-defendants for costs paid by one of them on the ground that the defence in the previous suit denied a state of facts known by the defendants to be true, I must respectfully decline to follow that ruling, nor do I think that the proposition there broadly stated necessarily follows from the case reported as *Muringa Mangalath Gopalan Nayar v. Kinyaka Kovilagath Valia Tamburathi* (8), which was relied upon in support of it. The expression "false defence," which has been used from time to time in judgments in which the question of contribution has been considered, appears to me to have led to some confusion of thought and to have induced the Courts in some cases to treat as a wrongful act that which in itself was perfectly legitimate.

The English case of *Dearsly v. Middleweek* (9) was also relied upon for the proposition that where co-defendants are decreed to pay the costs of an action, one of them who has paid the whole of the costs cannot obtain contribution from the other. The case which is very shortly reported, the judgment consisting of about six lines, appears to have been

(7) [1897] 24 Cal. 330.

(8) [1884] 7 Mad. 87.

(9) [1880] 18 Ch. D. 236.

based upon a dictum of the Court of appeal in the case of *Real and Personal Advance Company v. McCarthy* (10), which had been decided on the previous day and referred to by one of the learned counsel engaged to the effect that no apportionment of or contribution for costs could be obtained by one co-defendant against another in an independent proceeding. That case is reported at p. 362 of the same volume and came before the Court of appeal on the plaintiff's objection to taxation. One of two defendants in an action in ejectment obtained leave to withdraw his defence on the terms of his paying to the plaintiffs their costs of the action, "so far as they were occasioned by the said defence of the said defendant." Upon taxation of the plaintiff's costs against that defendant the Taxing Master held that the only costs which such defendant was liable to pay under the order were the increased costs occasioned by such defendant having defended the action and that he was not liable to pay an apportioned part of the plaintiffs' general costs. The Court of appeal supported the Taxing Master. One of the questions was whether part of the general costs of the action ought not to be apportioned against those defendants under the terms of the order. The dictum relied upon in *Dearsly v. Middleweek* (9) was in these words:

"If the appellants were right in their action, they ought to have their whole costs from the defendants or some of them. But this is Common law action and at Common law there is no such thing as apportionment of costs. There is an apportionment of costs in equity, but it is of quite a different kind. It is an apportionment of costs between different claims."

The question of contribution between co-defendants, where one of them has paid the liability of both, was not dealt with, and the case of *Dearsly v. Middleweek* (9) appears to have been based upon a misapprehension of what was said in the earlier case. I cannot therefore regard this decision as an authority, conflicting as it does with the principle of contribution now well recognized. The other cases relied upon by the appellant need not be referred to in detail. They were cases where the parties were clearly joint tortfeasors, or where the plaintiff seeking contribution had been the real defendant in the previous suit or where the costs in respect to which contribution was

claimed had not in fact been paid by the plaintiff. On the other hand the case of *Brajendro Kumar Roy v. Rash Behari Roy* (11) clearly recognizes the principle upon which the right to contribution in such cases is based. In that case a decree had been obtained against the plaintiff and the defendants for damages for breach of a covenant not to open a ferry at a particular place. The decree was executed against the plaintiff alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrongdoers and that no suit for contribution would lie as between them. The High Court held that the rule relied upon by the Courts below had no application to the circumstances of the case and that the plaintiff was entitled to maintain his action. The Munsif had found that the plaintiff and the defendants made a conspiracy and opened the ferry ghat in violation of an agreement made by them in favour of the plaintiff in the suit for damages, and that they knew that they were doing an illegal or wrong act, and for that reason held the suit not tenable. The District Judge took the same opinion, holding that as the ferry had been opened in violation of an agreement previously come to, it seemed to him that this constituted the defendants wrongdoers in the sense that they knew or ought to have known that they were doing a wrong or unlawful act. The High Court came to the conclusion that both the Courts below erred in treating the plaintiff and defendants as wrongdoers.

"When the Munsif speaks of a conspiracy", said Norris, J., in his judgment, "the utmost that he can mean is that the plaintiff and defendant met together and deliberately agreed to break their covenant and establish a ferry ghat. This is not sufficient to constitute a conspiracy. To constitute a conspiracy there must be an agreement between two or more persons to do some thing either *malum prohibitum* or *malum in se* or to do something which they are entitled to do only by illegal means;"

and he came to the conclusion that the plaintiff and the defendants were guilty only of a breach of contract which would render them liable for damages under their contract but which was not in itself an actionable wrong. The Court allowed the appeal but remanded the

(10) [1880] 18 Ch. D. 302.

(11) [1886] 13 Cal. 300.

case to the lower Court to be tried on the merits.

The case of *Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib* (12) is another case where the Subordinate Judge had dismissed a suit for contribution partly on the ground that the parties had put in a false defence in a previous suit which had failed. The suit in which the costs were incurred was one for partition and the whole of the costs had been paid by one of the defendants who sought contribution from his co-defendants. The High Court, consisting of Sir Arnold, White, C. J., and Benson, J., allowed the plaintiff's claim for contribution, as there was no tort which could bring it within the ruling of *Merryweather v. Nixan* (4). It seems clear therefore that the doctrine of contribution is well recognized in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong or where the equities of the case demand that the plaintiff should not recover, as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it. Again there may be cases where it is just and proper that the liability should be apportioned in unequal shares. In the present case it seems to me that no distinction can be drawn between the respective liability of the plaintiff and defendant and that this appeal should be dismissed with costs.

Adami, J.—I agree.

V.S./ R.K

Appeal dismissed.

(12) [1903] 26 Mad. 373.

A. I. R. 1919 Patna 171

JWALA PRASAD, J.

Mt. Nasiban—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 440 of 1917, Decided on 11th December 1917 from order of Addl. Dist. Magistrate, Patna, D/- 17th October 1917.

Criminal P. C., (1898), Ss. 125 and 428—S. 428 does not apply to order under S. 125—Order directing furnishing of security illegal or irregular—Order should be set aside and not remanded for further inquiry.

A proceeding under S. 125 is neither appellate nor revisional and S. 428 of the Code dealing with remand has no application to an order under S. 125.

Where therefore a District Magistrate finds that an order directing the furnishing of secu-

rity is illegal or irregular he should set it aside. He has no jurisdiction to remand the case to the Magistrate for further inquiry. [P 172 C 1]

Bankin Ch. Dey—for Petitioner.

Judgment.—The petitioner in this case complained on 28th August 1917 against one Nursingh Singh and others, with whom she had a long standing dispute and litigation. The matter was referred to the Sub-Deputy Magistrate of Barh for inquiry, who recommended that the accused named by the petitioner be bound down under S. 107, Criminal P. C. Accordingly the Subdivisional Magistrate instituted proceedings against those persons, and on 20th September 1917 ordered Nursingh Singh and others under S. 118 to execute a bond with sureties. This order of the Magistrate was upheld in appeal by the District Magistrate under S. 125, Criminal P. C. The Subdivisional Magistrate however on the very day that he passed orders under S. 118 against Nursingh and others, instituted proceedings under S. 107 against the petitioner *Mt. Nasiban* who was complainant in the first case. The Magistrate in his order of the 20th September referred to above says as follows:

"From facts which came to light in the course of proceedings under S. 107, Criminal P. C., instituted by *Mt. Nasiban* against *Nursingh Singh* and others, it appears to me that both parties are equally to blame for the danger of a breach of the peace which exists. I therefore order her to show cause under S. 107, Criminal P. C., why should not give security of Rs. 100 with two equal sureties to keep the peace for one year."

Thereafter one witness *Nursingh*, accused in the counter-case, was examined by the Magistrate and the order against the petitioner was made absolute. The petitioner moved the District Magistrate of Patna, under S. 125, Criminal P. C. Her application was disposed of by the Additional District Magistrate by his order dated 17th October 1917. By this order the Additional Magistrate sent the case back to the subdivisional officer for recording the evidence in full of both parties, and to resubmit the record to him. He remarked that:

"the proceeding under S. 107, Criminal P. C., against the petitioner was framed without previous warning,"

and that:

"she had no idea that she would be called upon to answer a charge under S. 107, Criminal P. C."

and that:

"the record showed that the inquiry into the charge was not as complete as one would wish."

In these findings the Additional District Magistrate practically recorded "suffi-

cient reason" for setting aside the order of the Subdivisional Magistrate and cancelling the bond under S. 125 of the Code. He should have accordingly set aside the order of the Subdivisional Magistrate binding down the petitioner. I do not find any provision in the Code for the remand order that the Magistrate made in this case. The proceeding under S. 125 is neither appellate nor revisional: *Barka Chandra Dey v. Jummejoy Dutt* (1). S. 428, Criminal P. C., dealing with remands has no application to an order under S. 125. The order of the District Magistrate was therefore bad and should be set aside. The order of the Subdivisional Magistrate is equally irregular and illegal.

Mt. Nasiban was merely a witness in the case which she had brought against Nursing Singh and others under S. 107. Her case was that there was an apprehension of a breach of the peace on account of the overt acts of the opponents, Nursing Singh and others, and that they were molesting her and her husband. There was, as said above, a report against her opponents by a Sub-Deputy Magistrate, but there does not appear to be any report either of the police or of the Magistrate that she was likely to commit a breach of the peace. The proceeding against the Mussamat was instituted by the order of the Magistrate of 20th September. This order also does not show that she was doing any act from which a breach of the peace on her part could be apprehended. The order is wrong under S. 107, which says that:

"whenever a Magistrate is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity he can then take action under the section."

The reason for the Magistrate to draw up proceedings under S. 107 against the petitioner appears to be that he considered her to be a litigant and unscrupulous woman and that from the evidence recorded by him in the case in which she was only a witness it appeared to him that "both parties were equally to blame for a danger of a breach of the peace." I do not think that this is enough for the Magistrate to exercise jurisdiction under S. 107. It is not known what facts came to the knowledge of the Magistrate during the hearing of the proceedings against the opponents of the Muassamat. The proceed-

ings are therefore ultra vires. The second ground upon which I would set aside the order of the Magistrate is that the material before him was too meagre for binding down the Mussamat. One witness, Nursing Singh, who was her opponent, was examined and upon the evidence of that witness alone the Magistrate bound down the Mussamat. His evidence is quoted hereunder in extenso:

"Mt. Nasiben is always troubling me and abusing me. I brought a case against her and got a decree for money. This is the reason for her ill feeling. She once brought a case of loot against me in which I was acquitted."

The witness does not speak of any danger of the breach of the peace on the part of the Mussamat. He is her opponent and is too much interested and vindictive to be relied upon. His evidence is not enough for the binding down of the Mussamat. As held by the Additional District Magistrate, no previous warning was given to her that she was to answer a charge under S. 107 when she came to attend the Court to give evidence in her case. I should say that the petitioner was taken by surprise. The order of the Magistrate should therefore be set aside. If the Magistrate believes that there is a danger of a breach of the peace to be committed on the part of the Mussamat he should institute regular proceedings afresh under S. 107 and dispose of them according to law. The present proceedings are therefore quashed.

V.S./R.K. *Proceedings quashed.*

A. I. R. 1919 Patna 172

JWALA PRASAD, J.

Biru Thakur and another—2nd Party—Petitioners.

v.

Gokhul Raut and others—1st Party—Opposite Party.

Criminal Revn. No. 67 of 1918, Decided on 8th March 1918, from order of Magistrate, Sitamarhi.

Criminal P. C., (1898), Ss. 133 and 137—Parties consenting to decision upon local—Regular trial is not dispensed with—Order without trial is illegal.

Where in a proceeding under S. 133 the opposite party appears and shows cause, the Magistrate should under S. 137 of the Code hold an inquiry as provided for the trial of summons cases. The consent of the parties to have the case decided upon the local inspection does not dispense with the necessity of holding a regular trial under S. 137 and deciding the case on legal evidence.

[P 173 C 1]

(1) [1905] 32 Cal. 948.

Murari Prasad—for Petitioners.

Baikuntha Nath Mitter — for Opposite Party.

Judgment.—The order of the Magistrate is clearly illegal, inasmuch as the Magistrate has not followed provisions of law prescribed in S. 137, Criminal P. C. The conditional order under S. 133, Criminal P. C., was issued upon the petitioners on the complaint of the opposite party that there was obstruction to a public way. On 2nd December 1917 the petitioners showed cause, asserting that the way was not a public one but was a private land known as gairmazrua land belonging to the plaintiffs as proprietors thereof. At the request of the parties on 16th December 1917 the Magistrate inspected the land in dispute and directed the case to be put up on 19th for orders. On 19th the Magistrate held that the land in dispute was a clear path for men and cattle and directed the removal of the obstructions fixing 9th January 1918. The above order was passed solely on the result of the previous local inspection held by the Magistrate. As the opposite party had already showed cause the procedure to be adopted was that prescribed under S. 137, Criminal P. C., that is, the Magistrate should have held an inquiry as provided for the trial of summons cases. The Magistrate was bound to call upon the complainant to adduce evidence, and then, if he was satisfied upon the evidence adduced by the complainant, the opposite party should have been called upon to rebut that evidence and the order should have been made under Cl. 3, S. 137, as a result of the evidence on both sides. The consent of the parties to have the case decided upon the local inspection does not dispense with the necessity of holding a regular trial under S. 137 and deciding the case on legal evidence. The case of *Upendra Nath Mandal v. Rampal* (1) is an express authority upon this point. The petitioners had a right to test the evidence adduced by the complainant and to cross-examine the witnesses.

The Magistrate arrived at the conclusion simply by the local inspection and hence the opportunity of testing the testimony of the Magistrate by cross-examination by the opposite party was denied. The Magistrate in his explana-

tion says that none of the parties adduced evidence. The result in that case was that the complainant refused to substantiate his case by offering evidence, and therefore the conditional order should have been discharged. I had an opportunity of dealing with the question lately in *Ramsaran Koeri v. Ramlagan Ahir* (2), in which the authorities on the point have been reviewed, notably the case of *Sarojbasini Devi v. Sripati Charan* (3).

The result is that the order of the Magistrate is set aside, and the case is sent back to him to hold an inquiry in accordance with law.

V.S./R.K.

Case sent back.

(2) [1918] 43 I. C. 790.

(3) [1915] 42 Cal. 702=28 I. C. 799.

A. I. R. 1919 Patna 173

JWALA PRASAD, J.

Emperor

v.

Shamakandu and others—Accused.

Criminal Ref. Nos. 32, 33 and 34 of 1917, Decided on 15th June 1917, made by the Sess. Judge, Shahabad.

Police Act (5 of 1861), S. 30, Cl. (2)—License to control procession—Notice, special or general, must be issued on each occasion.

Under S. 30 there must be a notice, special or general, on each occasion on which an intended assembly or assemblies is or are required by the Superintendent of Police to be controlled by means of licenses to be taken out by the persons celebrating the festivities concerned. [P 174 C 1]

Judgment.—This criminal reference has been made by the Sessions Judge of Shahabad under S. 438, Criminal P. C., recommending that the order of the Magistrate of Sassaram, dated 29th January 1917, convicting the accused of an offence under S. 30, Cl. 2, Act 5 of 1861, and sentencing him to a fine of Rs. 20, in default 7 days' simple imprisonment, be reversed. He has been convicted for taking out a Mohurram procession without a license on 16th December 1916 and thereby disobeying S. 30, Cl. (2), Act 5 (1861). Under the aforesaid clause the District Superintendent of Police or Assistant District Superintendent of Police may:

"on being satisfied that it is intended by any persons or class of persons to convene or collect an assembly in any such (public) road, street, or thoroughfare, or to form a procession which would, in the judgment of the Magistrate of the district or of the subdivision of a district if uncontrolled, be likely to cause a breach of the peace, require by general or special notice that

(1) [1909] 4 I. C. 436.

the persons convening or collecting such assembly shall apply for a license."

The penalty for disobeying the requisition made by the notice issued by the District Superintendent or Assistant Superintendent of Police under the aforesaid clause is prescribed by S. 30, Cl. (2) of the Act, which says that every person opposing or not obeying the orders issued under the last three sections, Ss. 30, 30-A and 31, shall be liable, on conviction by a Magistrate, to a fine of Rs. 200. In the present case the Mohurram procession was taken out on 16th December 1916. No general or special notice appears to have been issued requiring that persons taking out processions on that occasion should apply for a license. A copy of a notification issued by the District Superintendent of Police, dated 10th November 1915, has been produced. This order was in connexion with the then ensuing Mohurram of 1915 as mentioned in the report of the District Superintendent of Police to the District Magistrate. The District Magistrate approved of the report of the District Superintendent of Police. That approval relates only to the procession to be issued or to be taken out for the then ensuing Mohurram referred to in the note of 10th November 1915. It cannot refer to the procession in question that was taken out by the accused in December 1916.

I agree with the learned Sessions Judge that there must be a notice, special or general, on each occasion on which an intended assembly or assemblies are required by the Superintendent of Police to be controlled by means of licenses to be taken out by the persons celebrating the festivities concerned. It is admitted by the District Magistrate in his explanation to the Sessions Judge that there was no notice forbidding the procession in connexion with the Mohurram of 1916. The notice or the order of the District Superintendent of Police of 10th November 1915 appears to me to have become inoperative and has no force or application to the celebrations of the Chaliswan (Mohurram) of 1916 in respect of which the accused has been convicted. The recommendations of the learned Sessions Judge are, therefore, accepted and the order of the Subdivisional Magistrate convicting the accused is, therefore, set aside, and the fine, if already realized, will be refunded. This

judgment will govern also Criminal Reference No. 33 of 1917 (*Emperor v. Abdul Latif and Abdul Majid*) and No. 34 of 1917 (*Emperor v. Masudan Khalifa Abdul Wahid and Abdul Samad*) in which the accused have been convicted by separate judgments of the same date and on the same charge. The points for consideration in all these references are the same. The convictions of the accused in References Nos 33 and 34 of 1917 are also set aside and the fines, if already realized will be refunded.

v.s./R.K.

Orders set aside.

A. I. R. 1919 Patna 174

JWALA PRASAD, J.

Manzur Hussain and others — Petitioners.

v.

Gauri Lal Das and others — Opposite Parties.

Criminal Revn. No. 207 of 1918, Decided on 10th June 1918, from order of Sub divl. Magistrate, Banka, D/- 19-3-1918.

(a) Criminal P. C., (1898), S. 147—Existence of right of use of water—Order directing obstruction to be removed or dam to be constructed is legal.

Where a Magistrate finds as a fact that a right of use of water in favour of any party exists, he can under S. 147, either direct an obstruction to be removed or direct that an obstruction or dam be constructed, as the case may be, for the purpose of enabling the party to enjoy the use of water declared in his favour. [P 176 C 1]

(b) Criminal P. C., (1898), S. 147—Dispute concerning right to use of water is within S. 147.

A dispute concerning the right to the use of water from an artificial water channel for the purpose of irrigation comes within the scope of S. 147. [P 176 C 1]

P. R. Das and Naresh Chandra Sinha —for Petitioners.

Hasan Imam and G. C. Pal—for Opposite Parties.

Judgment.—This is an application against an order of the Subdivisional Magistrate of Banka, dated 19th March 1918, under S. 147, Criminal P. C. The matter in dispute between the parties is concerning their right to the use of water from a certain channel called Loki Danr for the purpose of irrigation. The Loki Danr is an artificial water channel which emanates from the river Bilasi and runs through to the village of Majhgain. The second party belongs to Majhgain and Mainwa is a village north of Majhgain, and belongs to the first party. The channel runs north to south. Both the

parties claim to take water from the channel by means of singhas, artificial water conduits, erected in the channel connecting it with the fields in the respective villages. The first party further claims a right to erect an obstruction in the channel with a certain opening on one side of it for the purpose of taking water to its own fields in Mainwa. The opening is kept in order to let the water flow down to the village Manjhgain. The police reported that there was a dispute between the parties regarding the use of water and that there was a likelihood of a breach of the peace on account of the dispute. It was expressly mentioned in the report of the police that the dispute was regarding the right claimed by the first party, the proprietor of Mauza Mainwa, to erect a dam across the said Loki Danr. The Magistrate upon that report drew up proceedings under S. 147 setting forth that he was satisfied from the police report that a dispute existed between the parties which was likely to cause a breach of the peace

"concerning the right of use of the Loki Danr, namely, the right to take water from it through a singha (narrow channel) at the place where the singha in question runs from the Loki Danr to Mainwa."

Upon inquiry the Magistrate came to the conclusion that the first party had a right to use the water from the said water channel by constructing a dam with a small opening for the village of Manjhgain belonging to the second party. The Magistrate concluded his order in the following words:

"I come to the conclusion that at the source of the upper singha of Mainwa close to a kath tree a bandh existed, with an opening south of it to allow sufficient water to flow downwards; that the first party have the right to maintain the bandh and repair it. I direct that the first party continue to maintain the bandh with the opening in the south and repair it from time to time until the opposite party obtain decision of a competent Court adjudging them entitled to prevent the first party from doing so."

The second party has moved this Court in revision and contends that the order of the Magistrate is without jurisdiction. The first ground urged in support of this contention is that within the terms of S. 147 the Magistrate had no right to declare that the first party had a right to maintain the bandh and repair it. In support of this contention the case of *Empress v. Ganpat Kalwar* (1) is quoted, decided by Prinsep and Hand-

ley, JJ. There the dispute was between a landlord and tenant, the former disputing the right of the latter to re-erect a hut which had fallen down on a piece of land, the latter claiming the right to re-erect the hut. It was held that the dispute between the parties was one which raised the rights of the landlord and tenant in regard to the use of the land held by the tenant and that as such was not one within the jurisdiction of a criminal Court to determine. It was pointed out that *prima facie*

"the tenant would be entitled to erect a gola and if the landlord claimed the right to prevent him his proper course is to apply to the civil Court for an injunction, etc."

It was further observed towards the concluding portion of the judgment that:

"The proviso read with the body of the section clearly indicates that the legislature in enacting S. 147 intended to deal with rights to use land or water the property of others and as such in their possession."

There the land in question on which the hut was proposed to be erected by the tenant was in the possession of the tenant and no question arose regarding the use of land in the possession of another; nor was there any dispute in the nature of an easement. That case obviously has nothing to do with the present case, where each party is claiming the use of water emanating from the river and running through a particular channel. The dispute between the parties in this case is clearly within the terms of S. 147, Criminal P. C., "concerning the right of use of water including the right of easements." It is next contended that the order of Magistrate is bad, as it is in the nature of a declaration and that the Magistrate had no right to declare the first party entitled to erect a dam causing obstruction to the free flow of water southwards to the land of the second party. This contention is further based upon the fact that the direction of the Magistrate regarding the erection of the dam is in excess of the dispute specified in the proceedings under S. 145 quoted above. A reference to the report of the police upon which the proceeding is based and the proceedings drawn up by the Magistrate, both of which are quoted above, will show that the dispute was not really regarding the use of water inasmuch as no party disputed the right of the other to the use of the water of the river coming into

(1) [1900] 4 C. W. N. 779.

the channel, nor was there any dispute regarding the right of the parties to construct singhas or water conduits from the channel to the respective fields. The real dispute between the parties was the right claimed by the first party to construct a dam obstructing the free flow of the water southwards to the fields of the second party. The Magistrate held in terms of S. 147 that such a right did exist in favour of the first party. He was competent therefore to pass a further order permitting the first party to erect the dam in order to enjoy the right of taking water to its own lands as held by the Magistrate. In the case of *Pasupati Nath Bose v. Nando Lal Bose* (2) Prinssep and Handley, JJ., the learned Judges who had decided the case above quoted of *Empress v. Ganpat Kalwar* (1)] held that the Magistrate holding that a party has a right to the flow of water for the purpose of irrigation has a right to declare that the free flow of water shall not be interrupted by the erection of an obstruction by the other party. This was based upon the words in the section "make an order directing that such thing shall not be done." The same was the view taken in the case of *Lalit Chandra Neogi v. Tarini Prasad Gupta* (3), decided by Ameer Ali and Pratt, JJ., and recently in the case of *Dowlat Koer v. Siva Pershad* (4) decided by Holmwood and Sharfuddin, JJ.

If the order directing the removal of the obstruction is within the terms of the aforesaid clause, the order directing the erection of a dam causing obstruction will be also within the clause preceding the above, namely, "make an order for permitting such thing to be done;" in other words, to my mind, when the Magistrate finds as a fact that a right of use of water in favour of any party exists he can under S. 147 either direct the obstruction to be removed or direct that an obstruction or dam be constructed, as the case may be, for the purpose of enabling the party to enjoy the use of water declared in his favour. I am thus of opinion that the order of the Magistrate is not ultra vires. The last contention was that all the persons interested in the case were not made parties. No doubt the parties in this case were the servants

of the proprietors of both the villages of Manjhgain and Mainwa. The proprietors themselves were not made parties. While the order under S. 147 is not vitiated by the fact that the proprietors were not made parties, it is well known that the proceedings and the order of the Magistrate thereon are binding only upon the persons that were actually parties to the proceedings; and the Magistrate would have been well advised to make the proprietors also of both the villages parties to the proceeding in order to finally determine the dispute of the real contending parties. The result is that the application is rejected.

V.S./R.K. Application rejected.

A. I. R. 1919 Patna 176

JWALA PRASAD, J.

Ratan Kumar Mahto—Defendant—Appellant.

v.

Kangal Kumar Mahto and another—Plaintiffs—Respondents.

Second Appeal No. 361 of 1917, Decided on 25th February 1918, from decision of Sub-Judge, Purulia, D/- 26th February 1917.

(a) **Adverse Possession—Trespasser—Possession confers devisable and transferable interest.**

The possession of a trespasser, although without title, confers upon him a devisable and transferable interest in the property and his heir or devisee can maintain an ejectment suit against any person other than the true owner who has entered upon the land. [P 177 C 2]

(b) **Adverse Possession—Transferee from trespasser can tack donor's possession to his own.**

A devisee of a trespasser can tack on the period of his devisor's possession to that of his own to resist a suit for ejectment. [P 177 C 2]

Gour Chandra Pal—for Appellant.

Abani Bhusan Mukherjee—for Respondents.

Judgment.—The only point raised in this appeal is that the lower appellate Court is wrong in holding that the plaintiffs have acquired title by adverse possession of over 12 years. The facts found are as follows:

The property in dispute belonged to one Thakur Das and was inherited by his son Alhad Kumar, who died about 20 years ago leaving a daughter named Bidhu Kumari and a stepmother, Baruni. The plaintiffs are daughter's sons of Mt. Baruni. The defendants are the distant agnates of Alhad. Neither Baruni nor plaintiffs, nor the defendants have any

(2) [1901] 28 Cal. 734.

(3) [1901] 5 C. W. N. 335.

(4) [1911] 10 I. C. 615.

title to the property in suit which belongs to Bidhu Kumari, the daughter of Alhad. Baruni died in 1321, corresponding to August or September 1914. After her death there was litigation between the plaintiffs, who are grandsons of Baruni, and Bidhu Kumari, daughter of Alhad. This was settled by means of a consent decree on 5th January 1915 in favour of the plaintiffs, who obtained delivery of possession by the civil Court. Prior to the delivery of possession there had already arisen a dispute as regards the property in suit between the plaintiffs and the defendants, which led to a proceeding under S. 145, Criminal P. C. The proceeding terminated on 6th May 1915, with an order declaring the defendants to be in possession of the property. Hence the plaintiffs brought the present suit on 25th May 1915. Both the Courts below have concurred in the finding that Bidhu Kumari was never in possession of the property and that Baruni Kumari was all along in possession ever since the death of Alhad and that she had been paying rent for the land and had her name recorded in the landlord's sherista. In 1310 Baruni executed a deed of gift in favour of the plaintiffs. The name of Baruni was recorded in the landlord's sherista and after 1310 the plaintiffs' names were substituted in place of Baruni in the landlord's sherista.

The Courts below have held that the plaintiffs came to be in possession of the lands in suit and continued to be in possession up to the time the dispute arose in 1914. Thus the possession of Baruni and thereafter of the plaintiffs, her grandsons and donees of the property, was continuous for over 12 years. The learned vakil for the appellants contends that the plaintiffs were in possession themselves for less than 12 years and that the period of possession of Baruni, their donor, should not be added for the purpose of computing the period of adverse possession. In support of this contention the case of *Guroo Churn Dutt v. Krishna Moni Gupta* (1), has been cited. In that case it was held that the possession of one trespasser could not be added to that of another. But in that case both the trespassers were independent and antagonists of each other, whereas in this case the plaintiffs do not claim independently of the first trespasser, Baruni, but

derive their title from her whose possession had already been running adverse against the true owner.

The possession of Baruni, although without any title, conferred upon her a devisable and transferable interest in the property and her heir or devisee could maintain ejectment against the person other than the true owner who has entered upon the land. This was the view taken in *Asher v. Whitelock* (2), and was affirmed by the Privy Council in *Sundar v. Parbati* (3) and since followed in *Gobind Prasad v. Mohan Lal* (4). Baruni and her donees, the plaintiffs deriving title through her can maintain a suit in ejectment against the defendants. The case of *Brindaban Chunder Roy v. Tara Chand Banerjee* (5) held further

"that the interest so passed confers an unimpeachable title which becomes complete as soon as the true owner's claim is barred by limitation, the practical effect of which is to extinguish the title in favour of the party in possession:" vide also *Gossain Das Chunder v. Issur Chunder Nath* (6).

The lower Court is therefore right in holding that the plaintiffs have acquired an indefeasible and perfect title by prescription on account of their own possession as well as that of Baruni. The appeal is therefore dismissed with costs.

V.S./R.K.

Appeal dismissed.

(2) [1866] 1 Q. B. 1.

(3) [1890] 12 All. 51=16 I. A. 186=5 Sar. 448 (P.C.).

(4) [1902] 24 All. 157.

(5) [1873] 20 W. R. 114.

(6) [1877] 3 Cal. 224.

A. I. R. 1919 Patna 177

DAWSON-MILLER, C. J. AND ADAMI, J.

Mahabir Sahu and others—Defendants
—Appellants.

v.

Ram Saran Sahu and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 4 of 1918, Decided on 23rd June 1919, from decision of Ali Imam, J., in Second Appeal No. 205 of 1917, D/- 18th January 1918, reported in 44 I. C. 19.

Riparian Rights—Right to use water of streamlet for irrigation or manufacture—Use must not interfere with lawful use by other proprietors.

The right of a riparian owner to use the water of a streamlet either for the purpose of irrigation or for the purpose of manufacture is an extraordinary use of the water and is subject to the con-

(1) [1898] 2 C. W. N. 315.

dition that the use shall not interfere with the lawful use of the water by other proprietors.

[P 180 C 1]

Reyasut Hasan—for Appellants.

Siva Nandan Rai—for Respondents.

Dawson-Miller, C J.—This is an appeal from a decision of a single Judge of this Court affirming a decree of the Subordinate Judge of Ranchi. The questions in dispute relate to the right of the defendants to use the water of a small stream which passes alongside or through their lands and then flows on into the land of the plaintiffs. It appears that some 40 or 50 years ago the plaintiffs' ancestors erected a dam across the bed of this stream which has at no time of the year a very great flow of water, and it appears that during the dry weather it is either entirely dried up or there is only a very small trickle. The object of erecting this dam across the river was that the water might accumulate and so be diverted for purposes of irrigating the plaintiffs' land, of which they have about 100 bighas under rice cultivation. A few years before the institution of the present suit it appears that the defendants, whose land adjoins this stream a little higher up, had been erecting, or endeavouring to erect, dams across the stream for the purpose of diverting the water on to their own tenement in order to irrigate their own rice fields. The plaintiffs were aggrieved by this on the ground that it did not allow sufficient water to flow down into their part of the stream, with the consequence that during the year immediately before the prosecution of the suit their fields were not properly irrigated and their crops suffered. They therefore instituted the present suit against the defendants claiming a declaration that they had acquired a right, which they called a right of easement, to irrigate their lands in Mauza Nuru, which is the mauza in which their lands are situate, by diverting the water of the stream by means of a chohka and that the defendants have no right to interfere with or diminish the quantity of water flowing through the said stream. They also claimed an injunction restraining the defendants from putting dams across the stream and from obstructing the flow of water through the stream into the plaintiffs' village. They further claimed an injunction restraining the defendants from diverting the flow of

water into the fields of their mauza. They asked that the defendants should be ordered to demolish the dams which they had erected and they further claimed damages.

The matter came before the Munsif, who granted a decree in favour of the plaintiffs but with considerable modifications. His decree declared that the plaintiffs have as much right to irrigate their lands as the defendants and that the defendants should not take or obstruct more than a twentieth part of the water of this rivulet for irrigating their lands at any time when these fields stand in need of irrigation. They were also restrained from taking any more than the said quantity of water. That, of course, was not the declaration or the injunction which the plaintiffs were asking for, and it did not satisfy them because their case was that, having acquired a right of using the water for purposes of irrigation by prescription over a period of more than 40 years, the defendants by using the water for the same purpose were interfering with the rights which they had acquired, and that, although the riparian owners would have the ordinary rights of user of the water for domestic purposes such as washing and drinking and watering their cattle, they had not extraordinary rights such as diverting the flow of water for the purposes of irrigation so as to interfere either with the ordinary rights of the lower riparian owners or with the rights which they had acquired by prescription. And, as there was only sufficient water in the stream at any time to satisfy the needs of the plaintiffs for the purposes of irrigation, the defendants could not, in any event, use the water to any extent whatever for irrigating their own lands without interfering with the rights of the plaintiffs.

The matter was therefore taken on appeal to the Subordinate Judge. The Subordinate Judge in a very careful judgment, in which he reviewed the authorities, seems to me to have come to a correct decision. He found as a fact that the plaintiffs have acquired a prescriptive right to the use of the water of this stream for purposes of irrigation. He finds as a fact that the defendants, although within the last few years they have endeavoured to divert the water for irrigating their own lands, have acquired no such prescriptive right to the

use of the water for the purposes of irrigation. He also finds that the stream is a small one and very little water remains in it. The water is barely sufficient for the purpose of irrigating the plaintiffs' land. Therefore, any water taken from this stream by the defendants has the effect of diminishing the quantity of water required for irrigating the plaintiffs' land. These are the findings of fact which the Subordinate Judge has come to, and by these findings this Court is bound. Having arrived at these conclusions, the learned Subordinate Judge set aside the decree of the Munsif and in lieu thereof he granted the following declaration :

"That the plaintiffs have acquired a right to irrigate their land of Mauza Nuru by diverting water from the streamlet which rises in the Ulgara hills, passes through villages Choriya and Saradih and flows into village Nuru. It is further declared that defendants have no right to use the water of this streamlet for the purpose of irrigation; and further they have no right to place mud dams across this streamlet and thereby diminish the quantity of water which flowed down the stream to plaintiffs' village. The defendants are perpetually restrained from constructing dams across the streamlet and also from interfering with plaintiffs' right. The defendants are directed to remove the dams and ditch and channel existing in the bed of the stream within three months from the date hereof. In default the plaintiffs shall be entitled to have them demolished and filled up by Court in execution of decree. The plaintiffs shall also get Rs. 50 for damages in this case from the defendants";

and then the Subordinate Judge awards the appellants before him costs. From that decree an appeal was preferred to this Court which came before a single Judge who, after hearing the arguments of both parties, dismissed the appeal, coming to the conclusion that, on the facts found in this case, the decree of the learned Subordinate Judge was right. I ought to say that in the appeal before the learned Judge of this Court the only part of the decree which the appellants complained about was that part which declared that the defendants had no right to use the water of the streamlet for the purposes of irrigation. They did not contend that they had any right to dam up the stream and so divert the water on to their own lands, but they did contend that they had a natural right to the use of this water to some extent at all events for the purpose of irrigating their lands, and they claimed that this part of the declaration should be set aside or modified.

The learned Judge however came to a different conclusion and taking the findings of the Subordinate Judge that the streamlet was so small and the supply of water so little that it was barely sufficient for the purpose of irrigating the plaintiffs' land, held that that part of the declaration which was complained of was in the circumstances perfectly right according to law. He said :

"It is evident therefore that there is no such abundance of water coming through this streamlet as to irrigate the lands of the defendants without the lands of the plaintiffs suffering from want of water, and, as the right of the plaintiffs is established by prescription to the exclusive use of this water for the purpose of irrigating their 100 bighas of land, the ordinary incidents of riparian rights cannot be applied to their case."

From that decision the present appeal has been preferred to this Bench under Cl. 10 of the Letters Patent and the same arguments have been put before us as were apparently urged before the learned Judge. It has further been contended that, although the appellants had a grievance under the decree of the Subordinate Judge, they have got a still further grievance under the judgment of the learned Judge of this Court because of the words which I have just read from the concluding part of his judgment, where he speaks of the plaintiffs having acquired a prescriptive right to the exclusive use of the water for the purpose of irrigating their lands and the ordinary incidents of riparian rights not being applicable to the case. It has been contended before us that the right to irrigate is one of the ordinary rights of all the riparian owners and that the defendants in this case would be entitled to use the water for irrigation, at all events in a reasonable manner. It seems to me that the answer to this argument is that it is not accurate to describe the use of water for the purposes of irrigation as an ordinary right of a riparian owner. The difference between the ordinary uses of water running past a person's land and what may be called the extraordinary use of it has been laid down from time to time in judgments both in this country and in England, and the matter was very clearly dealt with by Lord Kingsdown in the case of *Miner v. Gilmour* (1), where that learned Judge in delivering the judgment of the Board said :

"By the general law applicable to running streams, every riparian proprietor has a right

(1) [1859] 12 Moore 131 (P.C.).

to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in a case of deficiency upon proprietors lower down the stream. But further he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

The right of the riparian owner to use the water either for the purpose of irrigation or for the purpose of manufacture, which is here described by Lord Kingsdown as extraordinary user of the water, is subject, as pointed out, to the condition that the use in that manner shall not interfere with the lawful use of the water by the other proprietors, and it has I think, been fairly clearly established at the present day that the condition under which the water may be used for this extraordinary purpose includes the restriction that the water which is taken and used must be restored substantially undiminished in volume and unchanged in character, so that the question which has to be considered in each of these cases where an extraordinary use is made of the water, as in the present case, for the purpose of irrigation is, whether the water used for this purpose does in fact substantially diminish the volume of water flowing in the stream so as to interfere with the rights of the lower riparian owners. It may be that in a large river a very considerable volume of water might be used and never returned again to the river by the riparian owner who is irrigating his lands by taking water from the river, and yet there would be no substantial diminution of the flow of water so as to interfere with the rights of the lower riparian owners. It may be again, in a case where there is a small stream, that the use of water for purposes of irrigation by one riparian owner might or might not interfere with the rights of those lower down the stream. It would be a question of fact in each case. But in the present case we have got to recollect what the actual findings are, and we have got to recollect further that the plaintiffs—respondents in this

case—have acquired in addition to the ordinary rights of using the water for domestic purposes a further right of using the water for purposes of irrigation. The finding is that the stream is a small one and that the water in it is barely sufficient for the purpose of irrigating the plaintiffs' land, and therefore any user by the defendants for the purpose of irrigation must necessarily diminish the volume of water so as to deprive the plaintiffs of their right of irrigation which they have undoubtedly acquired. Therefore it seems to me that the plaintiffs have established their case and were entitled to the injunction claimed, but I wish to point out, in case of any misapprehension, that where the learned Judge in the judgment now under appeal use the words,

"that as the right of the plaintiffs is established by prescription to the exclusive use of this water for the purpose of irrigating their 100 bighas of land, the ordinary incidents of riparian rights cannot be applied to their case,"

I do not think he was meanin any more than this: that, in considering the interference with the rights of the plaintiffs, by the defendants using the water to irrigate their lands, one had to consider not only the ordinary incidents attaching to the rights of riparian owners, but this further fact that the plaintiffs in this case had acquired an absolute right to dam up the river and irrigate their land and use the water for that purpose; and in speaking of the exclusive use of this water, he does not mean that the plaintiffs were entitled to use this water and prevent the defendants from using it for any purpose whatsoever. The defendants can obviously use the water for all ordinary purposes, which have been described as domestic purposes such as washing, drinking, and water for cattle; but as the defendants have not acquired any prescriptive right to use the water for purposes of irrigation and as they have no right at all to use the water for the purposes of irrigation if thereby they interfere with the rights of the plaintiffs, I think that all the learned Judge meant by the expression "exclusive use of the water" was that the plaintiffs were the only persons as between them and the defendants who are entitled to use the water for the purposes of irrigation and not that they alone had any right to use the water so as even to exclude the defendants from using it for ordinary,

domestic purposes. With these observations it seems to me that the decree appealed from in this case was right and that this appeal ought to be dismissed with costs.

Adami, J.— I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 181

DAWSON-MILLER, C. J., AND COUTTS, J.
Jnanendra Nath Bose — Plaintiff—
Appellant.

v.

Gadadhur Prasad and others—Defendants—Respondents.

First Appeal No. 132 of 1916, Decided on 18th February 1919, from decision of Sub-Judge, Patna D/- 16th May 1916.

Transfer of Property Act (1882), S. 53—Burden of proof—Transferee need not prove that transfer was not made with intent to defeat or defraud—If transfer appears to be fraudulent then transferee must prove that he took it in good faith.

Where a transfer of immovable property is attacked as having been made with intent to defeat the transferor's creditors, the onus lies in the first instance on the transferee to prove his interest in the property, and this onus can be satisfied by proving the conveyance in the transferee's favour and the passing of consideration in respect thereof. It is not incumbent on the transferee, whether the creditor alleges fraud in his pleadings or not, to prove that the transaction was not made with intent to defraud creditors. If however it should appear either from the transferee's evidence or from that of the creditor that there was such a fraudulent intent (and this would be presumed if the transfer was gratuitous or for grossly inadequate consideration), then the burden of proving that the transferee took in good faith would lie upon him; but in the absence of any such evidence he is entitled to succeed. [P 185 C 1]

S. M. Mullick and B. C. Mitter—for Appellant.

S. M. Dass and B. C. De—for Respondents.

Dawson-Miller, C. J.—This is an appeal by the plaintiff from a judgment of the Subordinate Judge of Patna, dated 16th May 1916, in which he dismissed the plaintiff's suit claiming a declaration that he was the sole decree-holder in a mortgage decree passed in Suit No. 446 of 1907 in favour of himself and Mukhudha Das Mitra by the Subordinate Judge of Patna, that Mukhudha Das Mitra had no subsisting interest in the decree and that the defendants had no right to attach any portion of the decree in execution of decrees against Mukhudha Das Mitra. The material facts are as follows: In the year 1907 the appellant and Mukhu-

dha Das Mitra instituted a mortgage suit against Sheo Narain Roy and others in the Court of the Subordinate Judge of Patna. On 28th July 1908 they obtained a preliminary decree for a sum of about Rs. 44,000 including costs. The appellant appears to have borne the costs of that suit and of a subsequent appeal to the High Court. Some time after the date of the decree Mukhudha Das Mitra left his home in Benares and went to live at Calcutta. On 12th July 1911 whilst the appeal was pending to the High Court in that suit, Mukhudha conveyed his half-share in the decree and in two other decrees amounting to about Rs. 12,300 to one Rameshwar Bhatta-charjee of Benares for the sum of Rupees 20,000. Later on he went to live at Chandernagore in French territory where he apparently still resides. Rameshwar as assignee of Mukhudha's interest was added as respondent in the appeal in which the High Court affirmed the decree of the Subordinate Judge on 14th February 1913.

On 5th November 1913 Rameshwar by a deed of that date conveyed his interest in the decree in question to the plaintiff for the sum of Rs. 4,500. The recitals in the deed state that Rs. 3,000 were due to the appellant from Rameshwar as his share of the costs and that there was another decree amounting to Rs. 19,827 in favour of Sardar Ranjit Singh of Jullundur chargeable upon the property from which the decree in question was realisable. On applying for a final decree before the Subordinate Judge of Patna, the appellant found that the defendants in execution of money decrees obtained at Benares against Mukhudha had got their decrees transferred to Patna for execution and had attached Mukhudha's interest in the decree in question after it had been transferred to the appellant. The appellant then obtained an order from the Subordinate Judge of Patna cancelling the attachment, but defendants 1 to 3 afterwards obtained a further attachment order of Mukhudha's interest in the same decree from the Subordinate Judge of Benares and the other defendants, it is alleged, are contemplating similar action. The appellant consequently instituted the present suit for the declaration mentioned.

The defendants' case is that the transfers by Mukhudha to Rameshwar and by

the latter to the appellant were made with the intention of defeating Mukhudha's creditors within the meaning of S. 53, T. P. Act. At the trial the conveyance by Mukhudha to Rameshwar was proved by two of the witnesses to the deed. The consideration was paid partly in Government currency notes and partly in cash, amounting in all to Rs. 20,000. The witnesses proved the passing of the consideration money to the transferor. The conveyance by Rameshwar to the appellant and payment of the consideration money by cheque was also proved by two of the witnesses to the deed under which the appellant acquired Rameshwar's interests. The cheque was drawn on the Bank of Bengal in favour of Rameshwar by the appellant's brother with whom he was living joint in estate. The Bank pass book was proved in evidence and clearly showed the passing of the consideration to the vendor. There is no evidence by the defendants to contradict the passing of the consideration for either of the transfers. Defendants 4 and 6 and a servant of defendant 1 were called.

They proved that Mukhudha and the appellant were cousins and that Rameshwar was a friend of Mukhudha, that defendant 6 had a decree for about Rupees 3,000 against Mukhudha obtained after the latter left Benares, that defendant 4 and 5 had a joint decree against Mukhudha for Rs. 2,000 obtained in June 1911 and that defendants 1 to 3 had a decree against him for about Rs. 25,000 obtained in 1909. There was no evidence to show how Mukhudha dealt with the sum of Rs. 20,000 obtained by him from Rameshwar or whether he paid any of his creditors with this money. He was undoubtedly in debt at the time when he transferred his interest in the decree to Rameshwar. Defendant 4 deposed that the transfer to Rameshwar was benami, but admitted that this was merely his opinion and there was nothing beyond suspicion to confirm it. Two of the defendants' witnesses said the sale by Rameshwar to the appellant was fraudulent, but beyond the bare statement to that effect there was no evidence to support it except such as might be inferred from the relationship between the parties and the fact that Mukhudha left Benares in debt. The learned Subordinate Judge held on this evidence that the sale by Mukhudha was collusive and

fraudulent and made with the object of defeating creditors and without consideration, and that in any case the consideration was inadequate. He further held that the sale by Rameshwar to the appellant was a fraudulent transaction executed without consideration and with the intention of defrauding creditors.

These conclusions arrived at by the learned Subordinate Judge were not based upon any affirmative evidence but on suspicion and conjecture arising from the relationship between the parties and the fact that Mukhudha was in debt. Further his finding that no consideration passed is not only unsupported by any evidence but was in direct conflict with the uncontradicted evidence in the case. It was proved by the appellant's witness Tarapada Ghosh that the consideration money for the first transaction was paid in his presence to Mukhudha partly in cash and partly in currency notes, and this received some confirmation from the deed itself which sets out in detail the numbers of the notes and the amount of cash. It was equally clearly proved that the consideration for the second transaction was paid by cheque to Rameshwar and that the cheque had passed through the appellant's account at the Bank of Bengal in due course. There is not a scrap of evidence to contradict this, but nevertheless the learned Judge finds as a fact that both these transactions were without consideration. He appears to have based his conclusion on this part of the case mainly upon the fact that neither Rameshwar nor the appellant was called to swear that the consideration money was paid. But where a fact is sufficiently proved by one or more witnesses for the plaintiff and their evidence is not shaken in cross-examination and where no rebutting evidence is called by the defendants, I fail to see how any inference adverse to the plaintiff can be drawn from the fact that he did not call further evidence to prove that of which there was no evidence to the contrary. Throughout his judgment the learned Judge, although he does not in terms say so, appears to treat the case as one in which the onus was on the plaintiff to prove that the transactions were not covered by S. 53, T. P. Act, and not on the defendants who were contending that the transfers were of the nature therein described.

The onus was no doubt in the first instance on the plaintiff to prove his interest in the decree. This onus he discharged by proof of the transfer to Rameshwar and the payment of the consideration and by the subsequent transfer by Rameshwar to himself and by the passing of the consideration for that conveyance. The plaintiff having successfully discharged that burden, the onus lay upon the defendants to prove the fraudulent nature of the transaction. This they could do either by showing that on the plaintiff's own evidence the transfer was made with intent to defeat creditors or by calling affirmative evidence of their own. In that case the onus would then be shifted on to the plaintiff to prove that he was no party to the fraud but took in good faith. The intention to defeat creditors would also be sufficiently proved by the defendants if it could be shown that the transfer was gratuitous or for a grossly inadequate consideration the law in such cases presuming such an intention. I have very carefully considered the evidence in this case and although there are some facts which might give rise to suspicion, I am unable to come to the conclusion that the evidence as a whole is sufficient to establish that the transfer in either case was made with intent to defraud creditors nor do I think it can be said that the consideration paid to Mukhudha, namely Rs. 20,000 was inadequate in the circumstances. The decree was a preliminary decree only when it was purchased by Rameshwar. It was at that time under appeal to the High Court and it might eventually have turned out to be worthless. What the chances were of realising the other decrees for about Rs. 12,000 included in the same deed of transfer we have no means of knowing, but anyone with experience of litigation in this country must know that securities of this kind are property of a highly speculative nature which may and frequently do take many years to realise requiring a substantial outlay for that purpose.

The same observations apply to the purchase by the appellant from Rameshwar with this added feature that when that conveyance was executed, according to the recitals in the deed, the property upon which the decree was charged had been subjected to a further charge of nearly Rs. 20,000 and the appellant had

a lien on the decretal amount eventually to be recovered for about Rs. 3,000 due from his fellow decree-holder for costs. It is said that the recitals in the deed are not evidence against those who are no parties to the deed of the truth of the matters set out in the recitals. This may be so, but the recitals are at least some evidence that in the minds of the contracting parties the facts were in accordance with the recitals, and this is important when considering the bona fides of the transaction on the question of adequacy of consideration. In the circumstances of the case as disclosed by the evidence, I do not think that it can fairly be said that the price paid by either Rameshwar on the appellant was grossly inadequate within the meaning of S. 53, T. P. Act. Moreover if the first transaction was a bona fide transaction Mukhudha's interest thereupon ceased and a subsequent transfer by his vendee even, if gratuitous, could have no effect upon the genuineness of the original transfer.

It was contended however that the onus was upon the appellant to prove not only the validity of the transfer by Mukhudha to Rameshwar and the payment of adequate consideration but also to prove affirmatively that it was not made with intent to defeat or delay creditors. I am unable to accept this proposition as a correct statement of the law but three cases were relied upon in support of it and require examination. These cases are: *Brajeshwar Peshakar v. Budhanuddi* (1), *Shib Narain Pahari v. Shankar Panigrahi* (2) and *Lala Hakim Lal v. Mooshahar Sahoo* (3). In the first case Hur Soonduri, defendant 1 mortgaged property to Brajeshwar Peshkar, the plaintiff, and subsequently sold the same property to Budhanuddi, defendant 2. The mortgagee (the plaintiff) claimed to realise the debt by a sale of the mortgaged property then in the hands of the subsequent purchaser Budhanuddi, Budhanuddi alleged that the mortgage was fraudulent and collusive. The case on appeal to the High Court was tried before Jackson and McDonell, JJ., who differed in opinion and called in the Chief Justice as a third Judge. The defendant Hur Soondari did not oppose the

(1) [1881] 6 Cal. 268.

(2) [1901] 5 C. W. N. 403.

(3) [1907] 34 Cal. 599.

suit and was called as a witness by the plaintiff, who herself also gave evidence as to the execution of the mortgage deed in her favour. The deed recited the payment of consideration. Hur Soondari's evidence proved extremely unsatisfactory as to the bona fides of the transaction and the Subordinate Judge disbelieved it and gave little credit to the witnesses who gave formal evidence of the execution of the mortgage deed and the passing of consideration. The defendant Budhanuddi called no evidence. The Subordinate Judge in these circumstances, although apparently not satisfied that the transaction was a genuine one, decided in favour of the plaintiff as he considered that the proof of the mortgage transaction was sufficient to place upon the defendant the burden of proving mala fides. The District Judge on appeal came to the conclusion that on the plaintiff's own evidence it was impossible to uphold the genuineness of the bond, by which he apparently meant the bona fides of the transaction on the part of Hur Soondari. On appeal to the High Court, Jackson, J., thought that the plaintiff had made out a prima facie case both as to the execution of the mortgage bond and the passing of consideration and that the defendant had not proved mala fides. McDonell, J., considered that on the whole the evidence justified the finding of the lower Court that the transaction was not a bona fide one, but he prefaced his decision by saying:

"In this case undeniably the bond had been executed and registered, and if the plaintiff had left the case there, the onus under the rulings cited by my learned brother would have been on the defendant to prove the bona fides of the bond. But the plaintiff was not satisfied to stop here."

He then refers to the other evidence given by the plaintiff's witnesses and arrives at the conclusion that on that evidence the District Judge was justified in finding for the defendant. The Chief Justice took a view in favour of the defendant. A passage in his judgment is much relied upon by the respondents in this case. It is as follows:

"The due execution of the bond is one thing, the bona fides and validity of it as against subsequent purchasers is another. But when, as in this case, the defendant puts the plaintiff to proof of the validity of the bond generally as against him (defendant 2), the plaintiff is bound to prove prima facie both the due execution of the bond and the bona fides of the transaction.

"But then it is said that the execution being proved, the bona fides are also proved prima facie by the plaintiff's own evidence as well as by the recital in the bond; and great weight has been attached (in deference to the authorities above cited) to the recital."

He then deals with the effect of recitals in a deed and it is, I think, fairly obvious that in the passage quoted where the expression "bona fides" is used, the learned Chief Justice was using that phrase in connexion with the passing of consideration, and he seems to assume that if it could be proved that consideration did pass as recited in the bond, the plaintiff would establish a prima facie case and shift the onus on to the defendant. He says:

"In a case of this kind, the weight to be attributed to the recital would depend entirely upon the other evidence of the bona fides of the bond,"

and sums up this matter thus:

"It was contended on the part of the appellant that, if part of the plaintiff's evidence was sufficient to establish a prima facie case, it was incumbent upon the defendant to prove a substantive case of fraud by evidence of his own. But the answer to this is that, though some of the plaintiff's evidence, taken by itself, might have amounted to prima facie proof in her favour still looking to the whole of her evidence, and to the circumstances of the case generally, there was ample ground to justify the lower Court in disbelieving her evidence and dismissing the suit."

This decision appears to me to be based upon the fact that the evidence as a whole was such that no reliance could be placed upon any part of it, although a portion of it taken by itself and in the absence of the rest might have been sufficient to prove the plaintiff's case. The decision of the majority of the Judges in that case further seems to me to be justified on the ground that although execution of the bond may have been proved, there was no evidence which would be accepted that any consideration passed, and in these circumstances there would be a presumption that the transfer was made with intent to defraud the subsequent transferee, which presumption had not been rebutted by the plaintiff. The second case above mentioned is based upon the decision I have just referred to and carries the matter no further. In that case also it was found on the evidence that the mortgage was a fraudulent transaction and the appellate Court held that the evidence justified the finding. The third case relied upon did not turn upon the

onus of proof at all. The passage relied upon is at p. 417 (of 6 C. L. J.) and is as follows:

"It was contended, on the other hand, by the learned vakil for the plaintiffs-respondents, that it was not enough to examine whether the conveyance which is the foundation of their title was for consideration, but that the Court must also investigate whether or not it was bona fide; and in support of this proposition, reliance was placed upon a passage from the judgment of this Court in the case of *Ishan Chunder v. Bishu Sirdar* (4). We are of opinion that in order to establish the validity of a conveyance impeached as fraudulent on creditors it is not enough to prove that it was for consideration, it must also be proved that it was made in good faith."

This passage regarded apart from its context might afford some foundation for the respondent's contention, but it must be remembered that the learned Judge was not here dealing with the question of onus of proof. He was considering whether the only test of the bona fides of the transfer was the intention of the transferor to pass an absolute title in the property for good consideration or whether even in such a case a bona fide transfer can be said to exist if the intention was to defraud creditors by converting land into money with the intention of placing it out of their reach. The passage, in my opinion, does no more than lay down the proposition that the Court, where there is evidence of fraud of the nature last mentioned, is bound to consider it and cannot assume that bona fides has been paid. In the present case it seems to me that the plaintiff satisfied the burden of proving his interest in the decree when he proved the conveyance to Rameshwar and the passing of the consideration money and the subsequent transfer by Rameshwar to himself. It was not incumbent upon him, in my opinion, whether the defendant alleged fraud or not in his pleading, to prove that the transaction was not made with intent to defraud creditors. If however it should appear either from the plaintiff's evidence or from that of the defendants that there was such a fraudulent intent (and this would be presumed if the transfer were gratuitous or for grossly inadequate consideration), then the burden of proving that the transferee took in good faith would lie upon the plaintiff, but in the absence of any such evidence the plaintiff is entitled to succeed. In the present case no such fraudulent intention has been proved and there is nothing, in my

(4) [1897] 24 Cal. 825.

opinion, from which it can be said to be inferred. This appeal will be allowed with costs here and in the Court below except as stated hereafter, the judgment and decree of the Subordinate Judge will be set aside and judgment entered for the appellant for a declaration in the terms of the prayer. We cannot allow the appellant the whole cost of printing the bank pass book which occupies 36 pages of the paper-book. He will be allowed the cost of printing one page, that which contains the material entry, the cost of the remaining 35 pages which were quite unnecessary, he will himself bear.

Coutts, J.—I agree.

V.S./R.K.

Appeal allowed.

*** A. I. R. 1919 Patna 185**

MANUK, J.

Mewa Sao and another—Defendants—Appellants.

v.

Nasiruddin—Plaintiff—Respondent.

Second Appeal No. 940 of 1917, Decided on 15th January 1919, from decision of Dist. Judge, Patna.

*** Easement—Light and Air—Extinguishment—Mere non-user does not amount to abandonment—Pulling down of old building does not destroy right.**

A prescriptive right may be lost through abandonment, but this would depend on the intention to be gathered from the circumstances in each particular case. If the interval is long and it is clear from the other circumstances that the right to light and air has been entirely abandoned, there can be no doubt that a fresh period of prescription would be necessary to establish such a right but mere non-user does not amount to abandonment. Further, it is not necessary that the building to enjoy the light should be identical with that which acquired the right, identical in the sense either of structure or of the purposes for which it is to be used.

[P 187 C 2, P 188 C 1]

Kulwant Sahay and Gurusaran Pershad—for Appellants.

Krishna Sahay—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff-respondent against the defendants-appellants for an injunction restraining the latter from building a wall in front of the plaintiff's house, which wall, it was alleged, would obstruct the passage of air and light of the plaintiff through three windows on the east side of his house. Having regard to the questions of law raised in this case it is necessary to set out the facts shortly.

The plaintiff alleged that 12 or 13 years ago he purchased three houses from

people called respectively Ali Sher Bulaqi and Ram Charan and that the two windows marked A and B on the plan filed with the plaint existed in the house which he purchased from Ali Sher. As to the window marked C, his case is that that window existed in the house of Bulaqi. When he pulled down the two old houses of Ali Sher and Bulaqi, he alleges that he built his new house taking particular care that the windows A, B and C of the new house should be in the same plan and of the same dimensions as the windows of the demolished houses. The defendants later began building a wall which would have blocked up all the three windows of the plaintiff on the eastern side of his house. The plaintiff therefore sued first for a permanent injunction, and apparently also obtained an ad interim order restraining the defendants from proceeding to build their wall, but before that order was served on the defendants a portion of this wall opposite the window B had already been erected. The plaintiff therefore with the leave of the Court amended his plaint and asked for a further relief, viz., that an order may issue to the defendants to demolish that portion of the wall already built.

The defence to the action was that there were no windows in the house of Ali Sher or Bulaqi, which would correspond to the windows, the subject-matter of the suit, as alleged by the plaintiff. There was a further defence based on an alleged agreement between the plaintiff and the defendants, but with this part of the defendants' case I am not now concerned as it was not referred to before the learned District Judge and has very properly not been raised at all in this Court. On these allegations the first Court found

"that the plaintiff and his predecessors had been exercising the right of light and air through these windows which had existed for more than 20 years as a matter of right and without obstruction."

It also found that the plaintiff's witnesses had proved that there was no change in the sizes and positions of the new windows relatively to the windows in the two demolished houses. It therefore decreed the plaintiff's suit, directed the defendants to pull down the wall opposite the window B and gave the plaintiff a perpetual injunction as prayed for.

On appeal the learned District Judge held that

"the evidence as to the existence of windows in the old house on the east side was singularly strong and convincing"

and that those windows had been used for the purposes of light and air. He also found that the plaintiff had established the identity in size and position of the new windows with the old ones. He held therefore that the plaintiff had proved his right to light and air by the windows A, B and C shown in the map attached to his plaint, by user for more than 20 years, and dismissed the defendants' appeal with costs. Two points have been taken before me by Mr. Kulwant Sahay on behalf of the appellants. The learned vakil first argues that there is no finding in the judgment of either Court that the old windows had already existed for 20 years before the old buildings were pulled down and the plaintiff's new building erected, and therefore the right had not till then been acquired as required by S. 26, Lim. Act, that being so, the plaintiff could not tack on to whatever period might have preceded the building of his new house the subsequent period since that building was erected, in order to complete the statutory period of 20 years.

The learned vakil next argues that by demolishing the old building the plaintiff abandoned the right even if it had already been acquired by 20 years' user; that, therefore, the only period which the plaintiff could call in aid was the period since which the new building existed; and as his own case is that the new building had existed for only 11 or 12 years, no right under S. 26, Lim. Act could possibly have been acquired.

I take the first contention. It is no doubt strictly speaking correct that the lower Courts have not in so many words found that the windows of the houses of Ali Sher and Bulaqi had existed for 20 years or more before those houses were demolished and the plaintiff's present house built on their site. I am satisfied, however, after a close consideration of both the judgments that both the Courts have held so in substance although not in precise terms. In coming to its finding, the first Court relied on the evidence of one Babu Shyam Lal Sinha whose age is about 55 years, and after setting out the substance of his evidence which was that he remembers to have seen the two

windows in Ali Sher's house from his childhood, the first Court proceeded to remark:

"He being a neighbour, there is apparently nothing strange in this. There is no reason whatever to disbelieve this witness."

The first Court also relied on other evidence indicative of the existence of the three windows for more than 30 years. The relevant passages taken in conjunction with the general finding already referred to are sufficient, in my opinion, to hold that the trial Court did find that the windows in the houses of Ali Sher and Bulaqi had existed for over 20 years prior to the demolition of those houses. Similarly the lower appellate Court in coming to its finding observes:

"P.W. 8 is an elderly pleader and has known the premises for 40 years. He speaks of the two windows that used to be in the upper storey where Nandalal Babu resided."

Here again this passage in conjunction with the other passages already referred to and the whole tenor of the judgment satisfy me that the learned District Judge held that the three windows in the two demolished houses had existed for over 20 years. Moreover, it does not appear to have been ever seriously contested by the defendants in the lower appellate Court that if these windows existed, they had not existed for 20 years prior to demolition of the two old houses. Under these circumstances, it is unnecessary to consider the second branch of Mr. Kulwant Sahay's contention on his first point viz., whether the doctrine of tacking would apply to this question of prescription. I now take the second contention. In support of this the learned vakil refers me to S. 45, Easements Act, which runs thus:

"An easement is extinguished when either the dominant or the servient heritage is completely destroyed."

It is conceded that this Act does not apply to this province but I am asked to hold on the authority of *Nritta Kumari Dassi v. Buddomoni Bewah* (1) that the principles of the Act may be looked to in order to evolve the law on the subject. That authority however lays down only this much: that it is useful to look to the definition of an easement in the Indian Easements Act when the Court has to consider what is or may be an easement in India. The decision goes no further than that: and I must decline to apply the principle in S. 45 to the question

(1) [1903] 30 Cal. 503.

before me. He next refers to the case of *Kalee Dass Banerjee v. Bhoobun Mohun Doss* (2), in which it was apparently held that if a house which has been in existence was pulled down and a new one built on its site, the prescriptive right of the plaintiff to air and light, if any, disappeared. The learned Judges did not make it quite clear, but they presumably held that the demolition of a building is equivalent to the extinction of the right to light and air which that building enjoyed. No authority, however is given for this proposition and it is in conflict with a later decision of the Calcutta High Court in the case of *Mr. A. Caspersz v. Raj Kumar* (3). In that case the learned Judges held that although it was true that the mere fact of the old house having been taken down, or having fallen down, and a new house being erected on its site, would not by itself be sufficient to extinguish any right to light and air which the owner of the house may possess, on the other hand it is not correct to say that because the owner of the old house was entitled to light and air coming through certain windows and doors, he would, after reconstruction of the house on the old site, continue to be entitled to light and air coming through any windows and doors in the same walls, irrespective of the positions and dimensions of the doors or windows. The learned Judges held that the test in such cases of extinction or non-extinction of the right was whether the easement claimed imposed a different and greater burden on the servient tenement from that which had previously existed. The question, they observed, would depend on whether the new doors and windows were in the same positions and of the same dimensions as the old doors and windows. While that authority undoubtedly is in conflict with the earlier decision and is sufficient for the purposes of the present case, I am of opinion with great respect to the learned Judges that they have in the passage last cited laid down too stringent a test. The principles shortly to my mind are as follows: A prescription may be lost through abandonment, but this would depend on the intention to be gathered from the circumstances in each particular case. If the interval is long and it is clear from

(2) [1873] 20 W.R. 185.

(3) [1899] 3 C.W.N. 28.

the other circumstances that the right to light and air has been entirely abandoned, there can be no doubt that a fresh period of prescription would be necessary to establish such a right; but mere non-user is not an abandonment.

Further it is not necessary that the building to enjoy the light should be identical with that which acquired the right, identical in the sense either of structure or of the purposes for which it is to be used. The case of *Ecclesiastical Commissioners v. Kino* (4) is ample authority for the proposition that a building may be pulled down and yet an action would lie, even before a fresh building was erected on the old site, to restrain any person from erecting a structure which might interfere with the ancient lights of the demolished building. In the last mentioned case the building was an ancient church. It was pulled down and the defendants, who had become the owners of some adjoining land, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying the same position as those of the late church. It is to be noticed that though there was no fresh building and no new windows as yet to replace the old ones, the Court held that a suit would lie and that mere demolition was not sufficient to destroy the right. The right to the pencils of light would remain even though the dominant tenement was pulled down or altered with a view to being rebuilt. Moreover, the whole law on the subject was in comparatively recent years reviewed by the Court of appeal in *Scott v. Pape* (5), and there it was held in precise terms that a building to enjoy the light after the 20 years is not required to be identical with the building which acquired the right so to enjoy. Cotton, L. J., in that case observed:

"In my opinion the question to be considered is this, whether the alteration is of such a nature as to preclude the plaintiff from alleging that he is using through the new apertures in the new wall the same cone of light, or a substantial part of that cone of light which went to the old building. If that is established, although the right must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part or the whole of the light which went through the old aperture."

(4) [1880] 14 Ch. D. 213.

(5) [1886] 31 Ch. D. 554.

And Bowen, L. J., in a concurring judgment observed:

"The structural identity of the building is not the test,"

and he goes on to say that the authorities show more, namely that the measure of enjoyment is not the aperture; itself but the size and dimensions of the aperture that alteration of the building has nothing to do with the question, but that the question is whether any change is being made in the measure of the volume of light which came through the aperture as it previously existed. His Lordship added:

"It would take a great deal to persuade me that a man intends to abandon any of the old light he enjoyed, if the building is rebuilt so as to preserve without confusion of proof the enjoyment either of the whole of the volume of light which was enjoyed before, or of some material part of it."

I may add that in this case before the Court of appeal there was a difference of 18 inches in the position of one of the windows, 13 inches in another and 2 feet 3 inches in a third from the positions of the windows in the old building. Applying these principles to the case before me I find that both the lower Courts have held beyond question and beyond criticism that the new windows in the plaintiff's new building are in fact identical in size and position with the windows in the demolished buildings of Ali Sher and Bulaqi. It was also faintly argued that the English Statute is different from the Indian Act; but there is in fact no substantial difference in this respect. That being so this appeal must fail and I accordingly dismiss it with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 188

ROE AND COUTTS, JJ.

Rafakat Hussain—Judgment-debtor—Appellant.

v.

Mehdi Hussain—Decree-holder—Respondent.

Appeal No. 202 of 1918, Decided on 2nd February 1919, from appellate order of Dist. Judge, Shahabad, D/- 24th June 1918.

Limitation Act (1908), Art. 182 (5)—Application to withdraw application for execution, is not step-in-aid.

An application to withdraw a previous application for execution is purely a redundancy and is therefore not a step-in-aid of execution and cannot operate to save limitation. [P 189 C 1]

Abani Bhusan Mukerji—for Appellant.
Rajendra Prasad—for Respondent.

Judgment—In this case the question whether the execution of the decree is time-barred depends upon whether an application to withdraw a previous application for execution could be regarded as a step-in-aid of execution. In view of the consistent rulings of the Courts that fresh execution proceedings can be brought at any time even though previous applications have been dismissed for default or withdrawn without permission to make a fresh application, it must be held that the application to withdraw from the previous execution proceedings was purely a redundancy and could not facilitate in any way the execution of the decree. In our view the learned District Judge was wrong in holding that the decree was not barred by limitation. The appeal is therefore decreed. It is ordered that the execution proceedings be struck off as time-barred. The judgment-debtor will have his costs in this Court and in the Court of Appeal and the Court of first instance.

V.S./R.K. *Appeal allowed.*

A. I. R. 1919 Patna 189

JWALA PRASAD, J.

Rup Narain Singh and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 15 of 1917, Decided on 12th November 1917, against order of Dist. Judge, Gaya, D/- 17th July 1917.

(a) Criminal P. C. (1898), S. 476—Offence referred to in S. 195 must be brought to Court's notice during course of judicial proceedings.

All that S. 476 requires is that an offence mentioned or referred to in S. 195 of the Code should have been brought to the notice of the Court in the course of a judicial proceeding. [P 191 C 1]

(b) Criminal P. C. (1898), S. 476—Appellate Court has power to grant sanction.

Where an appeal is preferred to a District Judge and is disposed of according to law, the District Judge is fully competent to grant any sanction under S. 476 in respect of any offence that may have been committed in the case.

[P 192 C 1]

(c) Criminal P. C. (1898), S. 476—Nearest Magistrate can try case—Local or territorial jurisdiction is immaterial.

Section 476 vests jurisdiction in a Magistrate to try a case if one is sent to him for trial by a Court mentioned in that section. All that is required to give jurisdiction to the Magistrate to try the case is that he should have been the nearest Magistrate. The section has nothing to do with local or territorial jurisdiction at all.

[P 192 C 1]

S. A. A. Ashgar and Sheonandan Rai—for Applicants.

The Government Pleader—for the Crown.

Judgment.—This is an application against an order of the District Judge of Gaya, dated 17th July 1917, under S. 476, Criminal P. C., directing the prosecution of the petitioners under S. 209 read with Ss. 109 and 120-B, I. P. C. The petitioners 1 and 2, Rup Narain Singh and Shanker Prasad Singh, are residents of a village called Ehiapore, Parganna Sanout, District Gaya, and are landlords of a village called Chainpur in the same district. Petitioner 3, Amar Singh, is an inhabitant of village Sanout and resides at present in village Ehiapore where he is said to be the servant of petitioners 1 and 2.

One Fazle Ahmad is said to be a shawl merchant, having his shop at Gaya. He brought two suits one against Mukhi Singh and the other against Bisheshar Singh of village Chainpur in the district of Gaya. These suits were instituted in the Court of Diley (?), district Sialkot, in the Punjab. The suit against Mukhi Singh was numbered 389, and the suit against Bisheshar Singh was numbered 390 of 1914. The suits were for recovery of about Rs. 500 against each of the aforesaid persons Mukhi and Bisheshar Singh and the common ground in both suits was that the defendants, Mukhi Singh and Bisheshar Singh, were co-partners of the said Fazle Ahmad in the Chenab Canal contract and that they had misappropriated the profits of the same without giving the share of the profits to the plaintiff Fazle Ahmad. The summonses upon these defendants were served by affixing them upon the houses of the defendants Mukhi and Bisheshar Singh on the identification of Amar Singh (petitioner 3), the servant of petitioners 1 and 2.

Both the suits were decreed ex parte on 23rd May 1914. On 27th May 1914, the decrees were transferred to the Court of the Second Munsif of Gaya for execution. The execution of the decree was taken out and a prayer for warrant of arrest against the judgment-debtors Mukhi and Bisheshar was made by Fazle Ahmad the decree holder in those suits. Thereupon the defendants in both the suits brought regular suits in the Court of the First Munsif of Gaya, for a declaration that

the decrees obtained against them in the district of Sialkot were fraudulently obtained on the suppression of the summonses and on a false return of service of summonses through the conspiracy of petitioner 3, and that no money was due from the judgment-debtors and that they had never been to the Punjab and had never acted as co partners in any contract business with Fazle Ahmad, the decree-holder. The suit of Mukhi Singh was numbered 114 and that of Bisheshar Singh 115 in the Court of the First Munsif of Gaya. The petitioners entered appearance and, after contesting the suits were decreed with the result that the learned Munsif held:

"that defendant 1 (Fazle Ahmed) was dealing in shawls at Gaya and that he, at the instigation of defendants 2 and 3 (petitioners 1 and 2), preferred false suits in the district of Sialkot, and by causing false return of service of summonses filed, kept Mukhi Singh and Bisheshar Singh out of the knowledge of those suits and thereby prevented them from contesting the suits and thus obtained the decrees fraudulently."

This judgment of the learned Munsif was passed on 24th February 1916. Fazle Ahmad and petitioners 1 and 2 appealed to the District Judge of Gaya against the judgment and decree of the learned Munsif. Fazle Ahmad's appeals were numbered 84 and 87, Mukhi Singh's appeal was numbered 88, and Bisheshar Singh's appeal was numbered 89. On 17th April 1916 during the pendency of the appeal before the Judge, Ram Khelawan Singh, son of Bisheshar Singh, who died during the pendency of the suit before the Munsif, applied to the Munsif for sanction to prosecute the petitioners and Fazle Ahmad, and others who were witnesses in the case in the suits before him. That petition was forwarded by the Munsif to the District Judge before whom the appeals referred to above were pending. On 27th April 1916 the District Judge passed the following order: "Wait till the appeals are decided."

The appeals were fixed for 7th August for hearing. On that date the appellants in Appeals Nos. 88 and 89, that is petitioners Nos. 1 and 2, applied to the District Judge that their appeals may be heard after the decision of the appeals of the plaintiff Fazle Ahmad which bore Nos. 84 and 87. Fazle Ahmad did not appear and his appeals were dismissed for default. The learned District Judge thereupon took up the appeals of the

petitioners Nos. 1 and 2. The vakil for the petitioners orally prayed for a day's adjournment. This application for adjournment was refused by the District Judge and the appeals were dismissed for default, as the learned vakil for the appellants said that he had no instruction to proceed further. On 22nd May 1917 the Public Prosecutor of Gaya applied to the District Judge for obtaining sanction to prosecute the petitioners for offences set forth in that petitions, namely, Ss. 210/209 and 120-B, I. P. C. The application of the Public Prosecutor mentions three other persons against whom he prayed for sanction to prosecute, but those persons have not made any application to this Court. This was an application under S. 195, Criminal P. C. The learned District Judge rejected this petition in the following words:

"If my sanction would have any legal effect I would grant it, but so far as I can see, none of the offences have been committed in or in relation to any proceedings in this or any subordinate Court. The applicant should move the Court in which the proceedings were taken namely the civil Court at Amritsar."

Thereupon on 25th May 1917 the Public Prosecutor made another application praying that the District Judge, instead of granting sanction to him to prosecute the petitioners and others, might direct their prosecution under S. 476, Criminal P. C. Notice of this application was given to the petitioners and they, by their written application dated 13th July 1917 showed cause, and the District Judge by his order of 17th July 1917 finally directed the prosecution of the petitioners along with others under S. 476, Criminal P. C. Aggrieved by this order the petitioners have moved this Court. Several grounds have been taken against the order of the District Judge, both on law and on merits. The first ground urged before me was that there has been an inordinate delay in directing the prosecution of the petitioners and that the order, therefore made by him under S. 476 is bad.

The dates of the several proceedings in this case set forth above would show that the appeal was disposed of in August 1916 and that the present order was passed by the District Judge on 17th July 1917. No doubt there has been a delay in this case but considering the fact that one of the parties affected by the fraudu-

lent suits, namely Ram Khelawan Singh, had already made an application before the Munsif, on 17th April 1916 that is soon after the disposal of the case before Munsif, and also the fact that the present application was moved by the Public Prosecutor who apparently applied to the District Judge under instructions from the Magistrate, I do not think that the delay in this case has in any way prejudiced the petitioners. The petitioners were given full opportunity to show cause and as a matter of fact they, by their written petition, showed cause. It has not been contended before me that there was any prejudice on account of the delay caused in giving sanction by the District Judge in this case. I therefore overrule this objection of the petitioners.

The second ground taken by the petitioners is that the District Judge had no jurisdiction to grant sanction under S. 476 inasmuch as there was no judicial proceeding pending before him in the course of which he came to know of the offence having been committed. This is based upon the ground that the appeals before the District Judge were dismissed for default, and it is urged that the District Judge himself had no notice of any offence having been committed. I do not think that there is any force in this contention. It is not that the District Judge could have heard the appeal and disposed of it on contest that would give jurisdiction to him. He initiated the proceedings under S. 476. All that is required in that section is that the offence mentioned or referred to in S. 195 should have been brought to the notice of the Court in the course of a judicial proceeding. There were appeals filed before the District Judge from the decision of the Munsif. Those appeals were disposed of according to law; and the District Judge was therefore fully competent to grant any sanction under S. 476 in respect of offences that may have been committed by the petitioners. There was the judgment of the Munsif before him which had given the facts and circumstances of the case, and the finding of the Munsif in respect of the charges that are now proposed to be preferred against the petitioners. Those charges judicially came to the notice of the learned District Judge. I am therefore of opinion that the District Judge had jurisdiction to

direct the prosecution of the petitioners under S. 476.

Then it has been urged before me that in the judgment of the learned Munsif no offence has been sufficiently disclosed to have been committed by the petitioners, and therefore upon the merits the order under S. 476 should not have been made by the District Judge. The judgment of the Munsif has been read to me and I have carefully perused the same. I do not propose to give any opinion, for it might prejudice the parties upon the merits in this case as to whether upon the judgment of the learned Munsif there has been sufficient evidence against the petitioners. All that I want to say is that the judgment of the Munsif is based upon certain materials and evidence before him and upon the statements made by the witness of Fazle Ahmad and upon other evidence on the record, which have not been controverted or shown by the learned counsel for the petitioners to have been misquoted in the judgment. Upon those materials and upon the evidence the learned Munsif distinctly held in substance that there was a conspiracy between the petitioners 1 and 2 who were the landlords of the village Chainpur and the petitioner No. 3, their servant, to bring a false case in collusion with the plaintiff, who was a resident of Sialkot but was carrying on trade in Gaya, against Mukhi and Bisheshar Singh, two of the tenants who had a long standing enmity with them at the survey and elsewhere. The distinct finding of the learned Munsif, I have already quoted above and the conclusion that he has arrived at, is that defendant 1 had brought the suit at the instigation of defendants 2 and 3, who are petitioners 1 and 2 in this case, and that petitioner 3 played a very important part in the suits and also in the execution proceedings by trying to cause a surreptitious service of the summonses and notice upon Mukhi Singh and Bisheshar Singh. Upon this finding the learned Munsif himself would have been entitled to direct the prosecution of the petitioners under S. 476.

The criterion whether the District Judge was or was not justified in granting sanction is whether the Munsif, upon whose judgment the District Judge has proceeded, could himself grant the sanction. If the learned Munsif could have granted the sanction, there is no reason

why the learned Judge who heard the appeals and disposed of them according to law could not act and grant sanction. It cannot be said that there was no *prima facie* case against the petitioners for an action under S. 476. I am therefore not prepared to hold that the prosecution has no case upon the merits and that the petitioners ought not to be put upon their trial. The last ground that has been urged before me is this: that the Magistrate to whom the case had been made over by the District Judge under S. 476 for trial is not competent under S. 177, Criminal P. C., to take cognizance of the offences as they were committed in Sialkot in the Punjab and not in the Gaya District. It has been strenuously urged before me that the Magistrate at Gaya has no territorial jurisdiction to try offences committed in Sialkot, the offences being the bringing of false suits in the Court in the Sialkot District against the persons named by me aforesaid. It will appear from S. 476 that only the Magistrate at Gaya had jurisdiction to try the case. The learned counsel for the petitioners does not suggest which Magistrate had jurisdiction to try the case: all that he says is that the Magistrate had no jurisdiction. The words in S. 476 are:

"that the Court may send the case for inquiry or trial to the nearest Magistrate of the First Class."

The nearest Magistrate, it is not disputed in this case, would be the Magistrate of Gaya. Cl. 2 says that:

"such Magistrate shall thereupon proceed according to law, and as upon complaint made and recorded under S. 200, Criminal P. C."

Reading the expressions quoted above in Cls. 1 and 2, all that is required to give jurisdiction to the Magistrate to try the case is that he should have been the nearest Magistrate. S. 476 vests jurisdiction in the Magistrate to try a case if one has been sent to him for trial by a Court mentioned in that section. It has nothing to do with the local or territorial jurisdiction at all. It may be mentioned that in the Code of 1882 the words were "the nearest Magistrate who had cognizance to try the case." These words indicate that the Magistrate should otherwise have power to try the case territorially as in S. 177 onwards. The words "who had cognizance" have been taken out from the present section and therefore the territorial jurisdiction has

nothing to do with the jurisdiction exercised by Magistrates to whom a case is made over for trial under S. 476. The point appears to have been decided in the case of *Rajkumar Singh v. Emperor* (1) and in the authorities quoted thereunder from the Allahabad and the Madras High Courts. Apart from the authorities, in my view, the section is clear that the Magistrate at Gaya had jurisdiction to try the case. I overrule this objection also of the petitioners and I reject the application. The Rule is discharged.

V.S./R.K.

Rule discharged.

(1) [1917] 1 Pat. L. J. 298=37 I. C. 487.

* A. I. R. 1919 Patna 192 Full Bench

ATKINSON, COUTTS AND MANUK, JJ.
Bhubuneswar Prasad Singh and others
—Judgment-debtors—Petitioners.

v.

B. Tilakdhari Lal and others—Decree-holders—Opposite Parties.

Civil Revn. No. 71 of 1918, Decided on 9th January 1919, from order of Munsif, Banka (Bhagalpore), D/- 28th January 1918.

* Civil P. C. (1908), O. 9, R. 9 and O. 21, R. 90—O. 9, R. 9 does not apply to proceedings under O. 21, R. 90.

Order 9, R. 9, has no application to a proceeding in execution instituted under O. 21, R. 90, of the Code — [P 93 C 2]

Lalit Mohan Ghose and Hari Das—for Petitioners.

Naresh Chandra Sinha—for Opposite Parties.

Atkinson, J.—The facts in connexion with the reference referred to for decision are as follows: The plaintiffs in Original Suit No. 694 of 1914 obtained a rent decree on 25th August 1915 against the petitioners' father, as defendant, for the sum of Rs. 500 for arrears of rent due in respect of a tenure containing 186 bighas of land. After judgment the original defendant, father of the present petitioners, died. The rent decree, obtained by the decree-holders, was executed as against the minor petitioners by their mother as guardian, on a petition for leave to issue execution, dated 30th January 1917. Leave was granted as claimed, and the execution proceeded as against the minors' property. Notices of attachment, sale and proclamation were all duly served on the mother of the minor petitioners as their guardian. No appearance was entered in the execution

proceedings at any time by the guardian on behalf of the minors. No objection was at any time taken by the mother of the minors that she was nominated guardian of her minor children, even though she was not in fact duly appointed a guardian in accordance with the rules provided by the Civil Procedure Code. The date of the sale of the property in respect of which execution was being levied was fixed for 8th May 1917. On 8th May 1917 the aforesaid tenure, in the execution proceedings, was sold for Rs. 4,000, and purchased by the decree-holders as auction-purchasers. In due course the sale so effected was confirmed. Subsequent to the confirmation of the sale as aforesaid, an application by the guardian of the minors was filed on 6th June 1917 under O. 21, R. 90, seeking to have the sale set aside on the following grounds: (1) that no notice of the execution proceedings or sale had been served; (2) that the property was sold for an inadequate price; and (3) that no guardian was properly appointed by the Court to duly represent the minors in such execution proceedings. After due notice to all parties the hearing of this application was fixed for 19th January 1918. On 19th January the petitioners by their guardian applied for an adjournment of the said application so instituted, as aforesaid, on their behalf.

The application for adjournment was rightly and properly refused, in our opinion, by the learned Munsif. After the application for adjournment which was made by a subordinate or junior pleader on behalf of the petitioners was dismissed, the said pleader left the Court to require the attendance of the senior pleader who was retained in the case, and who happened to be in or about the Court compound, and also to endeavour to secure the attendance of some witnesses who were in attendance and within the precincts of the Court. By the time the senior pleader appeared in Court, he ascertained that the application under O. 21, R. 90, on behalf of the minors had been called on after the adjournment had been refused and was dismissed for default. Forthwith, on the very same day, viz., the 19th June, an application was filed on behalf of the minors by their guardian, seeking to have restored for hearing and disposal the application under O. 21, R. 90, which had

been dismissed, as aforesaid, under the provisions of O. 1, R. 9, Civil P. C. The hearing of this application was fixed for 28th January 1918. The learned Munsif held that O. 9, R. 9, had no application to a proceeding under O. 21, R. 90, and accordingly he held that he had no power or jurisdiction to grant the application for restoration, rehearing and disposal of the petition filed on 6th June 1917, under O. 21, R. 90. An application in civil revision was admitted for the purpose of challenging and testing the validity of the order of the learned Munsif dated 28th January 1918, which came for hearing before our learned brothers Roe and Coutts, JJ. Our learned brothers considered it advisable to refer the point requiring decision to a Full Bench of this Court, owing to the conflict of authority prevailing in other High Courts of India, but notably in the High Court of Calcutta, touching the matter immediately arising for our determination. Shortly stated, the legal point presented to us for final decision in this Court now is whether the provisions of O. 9, R. 9, apply to a proceeding instituted under O. 21, R. 90. We are unanimously of opinion that O. 9, R. 9, has no application to a proceeding in execution instituted under O. 21, R. 90, and consequently that the order of the learned Munsif, dated 28th January 1918, sought to be impugned is right and unassailable in point of law. In support of the arguments addressed to us on behalf of the petitioners and the opposite party respectively numerous authorities have been cited on either side.

In our unanimous opinion the true legal principles, which are applicable and ought to be applied in determining the matter arising for decision, are deducible through the current of authority commencing with the decision of the Privy Council reported as *Thakur Prasad v. Fakir Ullah* (1) and followed subsequently in the following cases of *Asim Mandal v. Raj Mohan Das* (2), *Hari Charan Ghosh v. Manmatha Nath Sen* (3), *A. Balasubramania Chetti v. Swarnammal* (4), *Gunraj Koer v. Lakhon*

(1) [1895] 17 All. 106=22 I. A. 44=6 Sar. 516 (P. C.).

(2) [1911] 11 I. C. 385.

(3) A. I. R. 1914 Cal. 126=41 Cal. 1=19 I. C. 683.

(4) [1913] 38 Mad. 199=21 I. C. 32.

Koer (5), *Bharat Chandra Nath v. Yasin Sarkar* (6), *Krupasindhu Roy v. Mahanta Balbhadra Das* (7), *Somasundram Pillai v. Chokkalinga Pillai* (8) and *Ritu Kuer v. Alakhdeo Narain Singha* (9).

It will be noted that two of the hereinbefore recited authorities are decisions of Division Benches of this Court and to which, in one case, one of us was a party, and in the third case reported as *Gunraj Koer v. Lakhan Koer* (5) a careful and reasoned judgment was delivered by Roe, J., sitting alone, to a like effect. Consequently, therefore since the inception of this High Court, the principles of law laid down by the Privy Council ruling reported as *Thakur Prasad v. Fakir Ullah* (1), followed and enunciated with clearness and precision in the judgment of Sir Lawrence Jenkins reported as *Hari Charan Ghosh v. Manmatha Nath Sen* (3), have been applied, and by this line of authority we conceive we are bound as exponents of the law, as applicable to the matter now referred to us for decision. On the other hand comparatively recent authorities are to be found in which a different view has been taken and different principles applied, to those enunciated by the antecedent authorities cited. The following are the cases referred to: *Krishna Chandra Pal v. Protap Chandra Pal* (10), *Safdar Ali v. Kishun Lal* (11), *Charu Chandra Ghosh v. Chandi Charan Roy* (12), *Subbiah Naicker v. Ramanathan Chettiar* (13), *Diljan Mihha Bibi v. Hemanta Kumar Roy* (14), *Bhuben Behari Nag Mazumdar v. Dhirendra Nath Banerjee* (15), *Kali Kanta Chuckerbutty v. Shyam Lal Das Basu* (16), *Bepin Behari Saha v. Abdul Barik* (17) and *Satya Narayan Lal v. Gobind Sahay* (18).

With the authority of these decisions we find ourselves unable to agree. In our opinion these authorities are not based

on any sound legal principle, nor are they founded upon a sure and reliable foundation, nor do they lay down any sure or definite rule of practice deducible from the true principles of law applicable to cases such as the present. Each of the last set of cases cited above depend for their decision upon the inherent facts of each case itself, and from them, as a whole, no decided and governing rule of practice is deducible. Accordingly, with great respect to the learned Judges whose aforesaid decisions are now under review, we desire to express our disapproval with the last series of cases cited, and to record our opinion that they do not enunciate a correct or accurate interpretation of the law applicable to the facts of this case or to similar cases in *pari materia* therewith. We have been asked and urged to exercise inherent powers vested in us under S. 151, Civil P. C., in granting relief in the present application. We are of opinion that there are no materials before us on which we could properly exercise our inherent powers, even if we felt willing to do so, which we do not.

The case has been argued exclusively on the basis that the order of the learned Munsif, dated 28th January 1918, was made without jurisdiction, and this point only was referred to us for decision by our learned brothers Roe and Coutts, JJ., and consequently we do not feel at liberty, nor are we entitled, to go outside the terms of the reference made to us and decide the question arising for determination upon the assumption that this Court ought to exercise its inherent powers even if willing to do so, and set aside the order impugned and restore the proceedings, more especially as an alternative remedy is open to the petitioners by way of miscellaneous appeal against the original order of dismissal of the petitioners' application, and which the petitioners have already availed themselves of and which application is still pending and awaiting decision. Accordingly we think the order of the learned Munsif was right and correct in point of law and that this application in revision must be dismissed, but under the circumstances, without costs.

Coutts, J.—I concur.

Manuk, J.—I concur.

V.S./R.K. Application dismissed.

- (5) [1916] 35 I. C. 337.
- (6) [1917] 41 I. C. 586.
- (7) [1918] 3 Pat. L. J. 367=47 I. C. 47.
- (8) [1917] 40 Mad. 780=38 I. C. 806.
- (9) [1918] 47 I. C. 154.
- (10) [1906] 3 C. L. J. 276.
- (11) [1910] 7 I. C. 241.
- (12) [1915] 27 I. C. 492.
- (13) A. I. R. 1914 Mad. 162=37 Mad. 462=22 I. C. 899.
- (14) [1915] 29 I. C. 395.
- (15) [1916] 33 I. C. 581.
- (16) [1917] 38 I. C. 598.
- (17) [1916] 44 Cal. 950=35 I. C. 613.
- (18) [1918] 3 Pat. L. J. 250=43 I. C. 951.

A. I. R. 1919 Patna 195

MULLICK AND ADAMI, JJ.

Dulhin Sundari Choudhurni—Defendant—Appellant.

v.

Behari Lal—Plaintiff—Respondent.

Second Appeal No. 782 of 1917, Decided on 2nd May 1919, from decision of Dist. Judge, Muzaffarpur.

Civil P. C. (1908), S. 100—Whether evidence given by mortgagee is sufficient to show that S. 59 was complied with is mixed question of law and fact.

It is a mixed question of law and fact whether or not the evidence adduced by a mortgagee suing on his mortgage on whom the onus rests is sufficient to show that the terms of S. 59, T. P. Act, have been duly complied with. [P 196 C 1]

Sharoshi Charan Mitra, S. M. Mullick and Sudhangsu Kumar Mitra—for Appellant.*Purnendu Narain Sinha and Murari Prasad*—for Respondent.

Mullick, J.—This appeal has been preferred by the mortgagor in respect of a mortgage-deed alleged to have been executed by her in favour of Hanuman Prasad, who was the grandson of one Lachmi Ram. The suit was brought by Mt. Nouji Kuer, the widow of Lachmi Ram, on the allegation that Hanuman Prasad was a mere namelender and that the mortgage money was in fact advanced by her out of the estate of her deceased husband, to which she had succeeded under the law applicable to Jains. During the pendency of the suit, that is to say, on 18th April 1913, Mt. Nouji died and on 25th April 1913, a petition was made by Behari Lal, through his grandmother Mt. Tarwati, alleging that he was the adopted son of Hanuman and was therefore entitled to his estate. It was further alleged that under the will of Lachmi Ram Mt. Nouji only took a life interest as a Hindu widow and that a vested interest in the estate was created in favour of Lachmi Ram's grandson, Hanuman, and that upon the death of Hanuman during the lifetime of Mt. Nouji that vested interest passed to Hanuman's son. The trial Court allowed the application of Behari Lal and amended the plaint holding that he was competent to continue the action against the defendant. The trial Court made a decree for the full amount of the claim against the defendant and that decree has been affirmed by the learned District Judge of Muzaffarpur. The learned District

Judge has held that upon a true construction of the will of Lachmi Ram what was given to the widow was a mere life estate with a vested remainder in Hanuman. He declined to accept the contention that Mt. Nouji's interest was an absolute estate and that of Hanuman a mere contingent remainder.

Now, we have been taken through the document and we agree with the interpretation put upon it by the learned District Judge. The estate created in favour of Mt. Nouji was clearly a limited one. Her powers of alienation were fettered and the document draws such a sharp distinction between the nature of her interest and that of Hanuman that it is impossible to accept the contention that an absolute estate is given in the first instance to the lady and in the event of her decease to Hanuman. In our view the true construction of the will is that Hanuman took a vested interest from the date on which the will came into operation. Therefore, the plaintiff Behari Lal, if he can prove the adoption, has a good title to the mortgage money in this case. Now the learned District Judge has found as a fact that the adoption did take place. The only way in which the learned vakil for the appellant before us can attack that finding is by contending that the learned District Judge has accepted in evidence an ekrarnama marked as Ex. 4 which in law was not legally admissible.

It is contended that the recital in this ekrarnama, which was a kind of deed of family arrangement executed by Mt. Nouji, Mt. Bhagirathi, the mother of Behari Lal, and by Mt. Tarawati, the grandmother, to the effect that Behari Lal had been adopted by Mt. Bhagirathi, was at most an admission which could not be evidence against anybody but the maker. Now, that would be so if the document did not come, as has been contended by the learned vakil for the respondent, under the purview of S. 13, Evidence Act. That section contemplates that recitals in the nature of hearsay when made in a transaction recognizing a right or custom are evidence. In this case a recital by Bhagirathi that she had adopted Behari Lal was in my opinion rightly accepted as evidence by the lower Court. There is also other evidence upon which the learned District Judge has founded his conclusion as to the validity

of the adoption. Therefore the second ground urged also fails.

But the third ground is one of substance and it seems that it is not concluded by the finding of the learned District Judge. It is contended that the bond in question has not been proved to have been duly attested by two witnesses as required by the provisions of the Transfer of Property Act. S. 68, Evidence Act, does not require the evidence of both these witnesses. One is sufficient, but the witness must come into Court and say not only that he signed the deed himself but that he saw the executant of the deed sign in his presence. There was some divergence of opinion on this point in the earlier decisions of the various Courts of this country, but the matter has now been settled by the decision of their Lordships of the Judicial Committee of the Privy Council in *Shamu Patter v. Abdul Kadir Rowthan* (1) and *Ganga Pershad Singh v. Ishri Pershad Singh* (2), and it is a mixed question of fact and law whether or not the evidence adduced by the plaintiff on whom the onus rests is sufficient to show that the terms of S. 59, T. P. Act, were duly complied with. Now, the only attesting witness called at the trial was witness 2 for the plaintiff. It is true that in examination-in-chief he said that the document was signed by the executant in his presence, but he has materially altered or modified that statement in cross-examination and the effect of his evidence taken as a whole is that he did not see the executant sign at all.

It is however sought to bring this case within the rule laid down by their Lordships in *Padarath Halwai v. Ram Narain Upadhia* (3), where a witness deposed that he saw the hand of the executant and knowing her voice was able to form the conclusion that the hand that signed the document was the hand of the person to whom the voice belonged. That however is not anywhere near the facts of the present case. Here witness 1, the scribe, does indeed endeavour to say that he heard the voice of the executant, but he admits that he had never heard her voice before; and it

is quite clear that he is not in a position to prove that the hand that signed the document was the hand of the defendant. Therefore in this case the onus, which lies upon the plaintiff as to the due attestation of the document and due proof thereof, has not been discharged. An attempt was made to seek the assistance of S. 70, Evidence Act, which says that if execution is admitted in the course of a trial the act of signing need not be proved. It is not necessary to go into the question whether or not this section relieves a party from the necessity of proving attestation. In the present case there is no clear indication that the defendant did at the trial admit execution of the document on which the suit is founded.

The result therefore is that as the document has not been proved to be a mortgage deed, the only decree which can be made is a simple money decree for money lent. The claimant is within time and therefore the decree of the learned District Judge will be set aside and a simple money decree will be substituted in lieu thereof for the principal sum with interest at the bond rate from the date of the bond to the date of the first Court's decree and interest thereafter at 6 per cent. per annum until realization. Having regard to the special circumstances of this case we do not give costs to either party.

V.S./R.K.

Decree varied.

A. I. R. 1919 Patna 196

DAWSON-MILLER, C. J. AND
ADAMI, J.

Raghunath Kurmi and others—Plaintiffs—Appellants.

v.

Deo Narain Rai and others—Defendants—Respondents.

Letters Patent Appeal No. 111 of 1917
Decided on 24th June 1919, from judgment of Mullick, J., D/- 21st May 1917, reported as 40 I. C. 771.

(a) Civil P. C. (1908), O. 14, R. 1—Court has no power to frame issue not raised in pleadings.

A Court is not justified in framing an issue on a question about which no dispute arises on the pleadings. [P 193 O 2]

(b) Decree—Construction—Decree in general terms—Judgment may be looked at—Civil P. C., S. 11.

Where a decree is expressed in general terms it is permissible to look to the judgment to as-

(1) [1912] 35 Mad. 607=39 I. A. 218=16 I. C. 250 (P.C.).

(2) A. I. R. 1918 P. C. 3=45 Cal. 748=45 I. A. 91=15 I. C. 1 (P.C.).

(3) A. I. R. 1915 P. C. 31=37 All. 474=42 I. A. 163=30 I. C. 366 (P.C.).

certain what the real issues were in order to see how far the decree operates as *res judicata*.

[P 199 C 1]

(c) Civil P. C. (1908), O. 41, R. 22—Respondent can support decree on ground decided against him.

It is open to a respondent in an appeal to support the decree on any of the grounds decided against him in the lower Court without preferring a cross appeal.

[P 199 C 1]

(d) Civil P. C. (1908), O. 41, R. 33—Scope.

An appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of the parties.

[P 199 C 1]

Abani Bhusan Mukerji—for Appellants.

Khurshed Husnain—for Respondents.

Judgment.—The plaintiffs have preferred this appeal under Cl. 10, Letters Patent, from a judgment of a single Judge of this Court, dated 21st May 1917, affirming a decree of the Subordinate Judge. The plaintiffs claim to be tenants of three small raiyati holdings in Mauza Parsanwah owned by the Dumraon Raj. In the last survey and settlement operations they were recorded in respect to two of the holdings as tenants of Deo Narain Rai, defendant 1, who is described as a tenure-holder under the Raj, whereas they contend that they are in fact direct tenants under the Maharaja of Dumraon and that defendant 1 has no interest as tenure-holder and is not their landlord. They were further aggrieved by the fact that three plots of land numbered 347, 348 and 482 in the survey had been recorded in the Survey Khatian as included within the khata of defendant 1, whereas they asserted that these plots should have been included as portions of their holdings. They therefore instituted a suit against (1) Deo Narain Rai, (2) the Maharaja of Dumraon and (3) Brija Ratt, a mukararidar of the Maharaja who has mortgaged his interest to the latter.

By their prayer in the plaint the plaintiffs claimed the following declarations: (1) that the plaintiffs are the direct raiyats under defendants 2 and 3, (2) that the relationship of tenant and landlord does not exist between the plaintiffs and defendant 1, (3) that defendant 1 is not a tenure-holder of the lands in suit and (4) that the disputed plots numbered 347, 348 and 482 are not part of the tenure of defendant 1 but part of the plaintiffs' holdings, and that the entries in the survey record to the contrary are wrong. They also claimed confirmation of their

possession or alternatively delivery of possession. Defendant 3 did not appear and service of summons on him was not proved. Defendants 1 and 2 contested the suit. Defendant 1 pleaded that he was a tenure-holder of the lands in suit under the Maharaja and that the disputed plots were not part of the holdings recorded in the plaintiffs' names. The Maharaja also pleaded that the plaintiffs were not his tenants but that defendant 1 was. Defendant 1 further contended that the plaintiffs had no interest in the disputed holdings which had been settled in the names of plaintiff 1 and his uncle respectively as benamidars of defendant 1, who was himself the real holder of the occupancy rights and that he paid the rent and took receipts in the farzi name of the plaintiffs, who, as well as their ancestors, were and had been this defendant's ploughmen. He further contended that the plaintiffs had improperly got themselves recorded as his raiyats, whereas they had no rights in the land at all and the survey record was incorrect in so far as it recorded them as tenants under him. It will thus be seen that the defendants agreed with the plaintiffs that there was no relationship of landlord and tenant between them although for different reasons. On the other issues they were in dispute.

The Munsif found (1) that the disputed plots were not part of the holdings claimed by the plaintiffs, (2) that the plaintiffs were not the direct tenants of the Raj, (3) that defendant 1 was the tenure-holder of the disputed holdings. With regard to the question whether the plaintiffs were tenants under defendant 1, I have already remarked that the plaintiffs disclaimed any such relationship and asked for a declaration that they were not the tenants of this defendant. The defendants were agreed about this and there was therefore no issue on this question raised by the pleadings. There was no alternative claim that they held under defendant 1 in the event of the first declaration being refused. The Munsif ought therefore to have treated the matter as concluded by the pleadings. It appears however from his judgment that he framed a separate issue 4:

"Does the relationship of landlord and tenant exist between the plaintiffs and defendant 1 in respect of khatahs numbered 175 and 178 (the disputed holdings)."

In dealing with this question he said:

"It seems to me that the defendant 1, after taking settlement of the lands benami in the name of plaintiff 1 and his uncle, allowed the plaintiffs to cultivate the land taking certain shares of the produce and used to pay the rent of the holdings to the Raj."

He then came to the conclusion that the oral evidence on both sides was not sufficient to rebut the presumption of the settlement entry and held that the Record of Rights was not liable to alteration and that the plaintiffs were the tenants of defendant 1. He then ordered that the suit be dismissed with costs. The decree has not been produced before us, but it is agreed that it is merely to the effect that the suit is dismissed with costs.

From this decision the plaintiffs appealed to the Subordinate Judge. It will be seen that, in so far as the judgment of the Munsif is concerned, it found that the plaintiffs were the tenants of defendant 1. This was, in fact, a finding against the defendants who denied the relationship. In fact there was no issue between the parties on this point and the Munsif ought not to have raised it as it was not the case of either side. He did however settle issue 4 raising this very question and decided it in the plaintiffs' favour. The decree therefore dismissing the suit with costs, although it was drawn in apt language to express a dismissal of the suit as originally pleaded, did not properly describe the result of the finding upon issue 4, which was really a finding in favour of the plaintiffs assuming they were found not to be the tenants of the Raj. When the plaintiffs appealed to the Subordinate Judge, the defendants entered a cross-appeal although the decree was apparently in their favour and contended that the finding that the plaintiffs were their tenants should be set aside. No objection was raised to this procedure at the time. The Subordinate Judge agreed with the Munsif in finding that the plaintiffs were not tenants of the Raj; and as both parties disputed the correctness of the entry in the Survey Khatian showing the plaintiffs as tenants of defendant 1, he allowed the cross-appeal and a decree was entered accordingly, the material part of which was:

"It is ordered that the appeal is dismissed with costs and the cross-appeal is allowed without costs, and the plaintiffs-appellants have no kasht rights."

From this decision the plaintiffs ap-

pealed to this Court and contended that the lower appellate Court should not have entertained the cross-appeal as the decree was in favour of the defendants who had therefore no right of appeal, as the Code of Civil Procedure only allows appeals against decrees and not against findings merely. The learned Judge of this Court who heard the appeal was of opinion that although he thought the finding that the plaintiffs were the tenants of defendant 1 would operate as *res judicata* under the decree of the Munsif, it was not necessary to decide this point because defendant 1 could, without filing a cross-appeal at all, have supported the Munsif's decree by satisfying the Subordinate Judge that the finding was wrong and that the decree, in so far as it dismissed the plaintiffs' claim including a dismissal of the claim under issue 4 that they were tenants of defendant 1, was right. He therefore dismissed the appeal with costs. From that decision the plaintiffs have preferred the present appeal.

The real difficulty in the case arises from the fact that the Munsif framed an issue on a question about which no dispute arose on the pleadings and having decided it really in favour of the plaintiffs and against defendant 1, he dismissed the plaintiffs' suit and entered a decree to that effect, ignoring or forgetting the fact that part of his findings were in favour of the plaintiffs and that he ought to have decreed the claim in part, treating the case as one in which the plaintiffs had claimed in the alternative that they were tenants of defendant 1. It is true the plaint claimed a declaration, first, that the plaintiffs were tenants of the Maharaja and, secondly, that they were not tenants of defendant 1. The defendants denied the right to the first declaration but admitted the second, and as there was no alternative claim that in the event of the first being decided against the plaintiffs they were entitled to a declaration that they were at least the tenants of defendant 1, there was no necessity to raise this issue. This issue however was raised at the trial and decided in the plaintiffs' favour just as if it had been claimed in the plaint as an alternative relief. It must be taken therefore that it was one of the issues in the case, and although the finding was in the plaintiffs' favour, the decree on this,

as on other issues, was in favour of the defendants. Now when the decree is in general terms, it is permissible to look to the judgment to ascertain what the real issues were in order to see how far the decree operates as *res judicata*, and if the Munsif's decree is binding, it must be taken that issue 4 was decided against the plaintiffs, and in this respect it was not in accordance with the findings. The plaintiffs might have applied to the Munsif to amend the decree in their favour in accordance with the findings, or they could have appealed. They chose the latter course.

In these circumstances it was open to the respondent before the Subordinate Judge, without instituting a cross-appeal, to support the decree on any of the grounds decided against him in the Court below. This is in fact what the defendant did and his cross-appeal was not really necessary. Defendant 1, the respondent before the Subordinate Judge, convinced him that the Munsif's finding was wrong and that the decree was right, although its effect was not that which the Munsif had intended. It seems to me therefore that, although in form the Subordinate Judge may have been wrong in saying that the cross-appeal was allowed, as the decree was not appealable by the defendant in substance, he was right in embodying in the decree a declaration that the plaintiffs had no *kasht* right in the property in suit. By O. 41, R. 33, the appellate Court has power to pass any decree which ought to have been passed or to make any further decree as the case may require in favour of any of the parties. The decree on the facts found by the Subordinate Judge was right, but he was entitled, in order to prevent ambiguity, to add that the plaintiffs had no *kasht* right. In these circumstances it appears to me that the learned Judge of this Court was right in dismissing the appeal. This appeal therefore fails and is dismissed with costs. In order to prevent any further question, the decree of this Court will be that the appeal is dismissed with costs, and it is further declared that the plaintiffs have no interest as tenants of the lands in suit.

V S./R.K.

*Appeal dismissed.***A. I. R. 1919 Patna 199**

DAS, J.

Munshi Juthan Lal—Appellant.

v.

Ram Dat Singh and others—Respondents.

Second Appeals Nos. 1161, 1162 and 1163 of 1917, Decided on 23rd June 1919, from decision of Sub-Judge, Patna.

Bengal Tenancy Act (1885), S. 88—Division of holding—Consent of landlord must be proved—Entry in landlord's rent roll showing division—Consent will be presumed—Road cess return is not rent roll—Rent receipt signed by patwari is also not admissible as evidence of such division. Plaint in recovery of rent suit by previous landlord will not justify conclusion of decision.

To enable a tenant to succeed upon a plea that there has been a division of holdings a distribution of rent thereof, he must establish that the division was made either with the express consent in writing of the landlord, or with the express consent in writing of his agent duly authorized in that behalf. The consent of the landlord will be presumed if there is proved to have been made in the landlord's rent roll any entry showing that the holdings have been divided or that the rent payable in respect thereof has been distributed.

[P 200 C 1]

A road-cess return, which is not a rent roll within the meaning of S. 88, Ben. Ten. Act, does not justify the conclusion that there has been such a division, especially where the road-cess return has been rejected by the Collector and has not in any way been acted upon. Nor is a rent receipt signed by the patwari admissible as evidence of such division, inasmuch as giving consent on behalf of his master to a division of the holding is outside the scope of the authority of a patwari, who is a mere rent collector. [P 201 C 1,2]

A plaint filed by a previous landlord for recovery of rent, as to which there may be a complete explanation would also not justify such a conclusion. [P 202 C 2]

Abani Bhushan Mukherji—for Appellant.

Ganesh Dut Singh—for Respondents.

Judgment.—The plaintiff purchased the entire 16 annas of Mauza Berhna Saidpur, bearing Touzi No. 2005, at a sale for non payment of Government revenue, and he commenced the actions out of which these appeals arise for rent against the tenants recorded as such in the finally published Record of Rights. The tenants put forward various defences to the suits, of which it is only necessary to mention that which was argued before the lower appellate Court and which found favour with that Court, namely, that there has been a division of the holdings and distribution of the rent payable in respect thereof and that therefore the suits were not maintainable in the form in which they were presented.

On behalf of the appellant it has been argued before me that the facts found by the lower appellate Court do not justify the conclusion "that the holdings of these three suits have been split up." It will be noticed that so far as the Record of Rights is concerned, it does not show that there has been any division of holdings and distribution of rent. The plaintiff is the purchaser at a revenue sale, and, therefore it cannot be suggested that he has suppressed the rent roll and other zamindari papers which would establish that there has been such a division with the consent of the zamindar.

The law on the subject is contained in S. 88, Ben. Ten. Act. In order to succeed, the tenants must establish that the division was made either with the express consent in writing of the landlord or with the express consent in writing of his agent duly authorized in that behalf, provided that the consent of the landlord will be presumed if there is proved to have been made in the landlord's rent roll any entry showing that the holdings have been divided or that the rent payable in respect thereof has been distributed. I do not think that the proviso has any effect at all in these cases, because no entry in the landlord's rent roll has been proved to show that the holdings have been divided or that the rent payable in respect thereof has been distributed. The learned Subordinate Judge does indeed say that "the road-cess return may be treated and is really a rent roll showing the holdings and the jama of the defendants within the meaning of the proviso of S. 88, Ben. Ten. Act." With this view I am wholly unable to agree. Rent roll is a term which has a definite significance, and is well understood in common language to mean the jamabandi papers of the zamindar, and I am of opinion that the term deliberately employed by the legislature must be construed in its popular sense, meaning by the words "the popular sense" that sense which people conversant with the subject matter with which the Statute is dealing would attribute to it: see *Grenfell v. Inland Revenue Commissioners* (1). I do not think that any one conversant with the subject-matter with which the Bengal Tenancy Act is dealing would understand by the term

"rent roll" the road-cess returns which the landlord is required to lodge under another Statute, and I am therefore unable to agree with the learned Subordinate Judge that the road-cess return is really a rent roll. In the second place the learned Subordinate Judge himself says that the road-cess returns in this case were not acted upon.

He says that the Collector valued the estate under S. 21 of the Act. Now S. 21 applies only where no returns are lodged by the holder of the estate. As there is a positive finding that the returns were in fact lodged on behalf of the proprietor, I thought that perhaps the Collector acted under S. 22 of the Cess Act, which gives him power to value the estate when he is satisfied that the return made is untrue or incorrect. Ex. 6 however (which is the order sheet in the cess revaluation case) makes it perfectly clear that the Collector was not satisfied with the return made and called for an explanation and as no explanation was offered, he valued the estate under S. 21, Cess Act. This in my opinion is destructive of any argument that may be founded on the cess returns lodged by the late proprietor. The Collector rejected the returns altogether and proceeded on the basis that no returns were lodged by the proprietor. I cannot see how these returns which were rejected by the Collector can, by any stretch of language, be described as the rent roll within the meaning of the proviso of S. 88, Ben. Ten. Act. I hold that the tenants have failed to bring these cases within the proviso of S. 88 and that in order to succeed, they must establish that the subdivision of the tenancy took place with the express consent in writing of the landlord or with that of his agent duly authorized in that behalf.

The lower appellate Court relies upon two items of evidence as establishing the consent of the landlord or that of his agent duly authorized in that behalf: (1) the road-cess returns filed by the landlord, and (2) the rent receipts granted by the landlord. So far as Second Appeal No. 1163 of 1917 is concerned, he relies upon an additional item of evidence, namely, a plaint filed by the previous landlord. So far as the road-cess returns are concerned, they were admittedly not signed by the landlord, but by one purporting to be the manager of the

(1) [1876] 1 Ex. D. 242.

landlord. The form of return prescribed by S. 14, Cess Act, shows that it must be signed by the holder or his authorized agent. I do not understand the lower appellate Court to hold that the person who signed the returns as manager was in fact the manager of the holder or his authorized agent. The burden of proving authority was undoubtedly on the tenants: see *Janki Sahu v. Thakur Run Bahadur Singh* (2). If the road cess returns had been filed on behalf of the present plaintiff, then the matter would be peculiarly within his special knowledge and the burden would perhaps be on him to show to whom he had given authority to sign the road cess returns. But the present plaintiff is a complete stranger and there is no privity between him and the previous landlord and if he is to be affected with something done by the previous landlord, I think he is entitled to say :

"Prove that it was done by the previous landlord or by his agent authorized in that behalf."

If these road cess returns had been accepted by the Collector, it might have been possible to argue with some show of reason that they must be presumed to have been regularly filed on behalf of the landlord, but the learned Subordinate Judge himself records a finding that they were not acted upon. There is therefore on the one hand, no evidence that these returns were signed by any person authorized in that behalf by the landlord; on the other hand there is positive evidence that they were rejected by the Collector and were not in any way acted upon. In my opinion it is impossible to hold that these returns prove the express consent in writing of the landlord or that of his agent duly authorized in that behalf within the meaning of S. 88, Ben. Ten. Act. The rent receipts do not in my opinion stand on a better footing. They were admittedly given by the patwaris, and there is no finding that the patwaris had any authority to recognize a subdivision of a tenancy. The question was debated in the case of *Wyatt v. Sheo Gobind Sahu* (3). The late Chief Justice of this Court in the course of his judgment said:

"The position and duties of a patwari are well known. He is a poorly paid underling employed only to collect rents due to his master and to grant receipts for the same. His implied authority would extend to all subordinate acts which are necessary or in-

cidental to his express authority. It is not suggested that he had authority to manage any part of the property. In my opinion, it is not within the scope of the authority of a rent collector to consent on behalf of his master to the transfer of an occupancy holding. That is an important act to be performed only by a person having some at least of the powers of a manager. I cannot accept the suggestion which has been made that it lay on the landlord in this case to prove that the patwari had not authority to consent to the transfer. Landlords would be in a very difficult position if it were held that patwaris and other underlings should be presumed till the contrary is shown, to have the power to sign away their master's rights."

Substantially the same view was taken in the case of *Janki Sahu v. Thakur Run Bahadur Singh* (2). If it is not within the scope of the authority of a patwari to consent to the transfer of an occupancy holding, it is difficult to see how it can be within the scope of his authority to consent to a division of the holding or distribution of the rent payable in respect thereof. I am of opinion therefore that the rent receipts are not evidence against the plaintiff as establishing a division of the holdings with the express consent in writing of the landlord or that of his agent duly authorized in that behalf. The rent receipts and the road-cess returns were the only items of evidence relied upon by the learned Subordinate Judge in Second Appeal No. 1161 of 1917 and Second Appeal No. 1162 of 1917. In my view they were not admissible against the plaintiff and they do not justify the conclusion that there has been a division of the holdings within the meaning of S. 88, Ben. Ten. Act. I would therefore allow these appeals, set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the Court of first instance.

I will now deal with Second Appeal No. 1163 of 1917. In this case, the lower appellate Court relied, in addition to the evidence already referred to, upon a plaint filed by the previous landlord against Chota Lal for the recovery of rent for 1319, 1320 and 1321. It is impossible to say what the conclusion of the lower appellate Court would have been, had it dismissed from its consideration the rent receipts and the road-cess returns. The survey area is shown as 3 bighas, 13 cattahs, 18 dhurs, bearing a jama of Rs. 11-6-7 dams. The argument is that the previous landlord by bringing a suit against Chota Lal in respect of 2 bighas,

(2) [1917] 39 I. C. 398.

(3) [1916] 36 I. C. 777.

16 cattahs, 4 dhurs at a rent of Rs. 8-4-1 showed conclusively that he had consented to a division of the holding. I cannot agree that it does. One noticeable feature about this appeal is that although the admitted area of the original holding was 3 bighas, 13 cattahs, 18 dhurs, the area after the alleged division comes up to 3 bighas, 9 cottahs, 7 dhurs. There is no explanation as to what has happened to 4 cattahs, 11 dhurs. I am wholly unable to come to the conclusion that there was a division of the holding within the meaning of S. 88, Ben. Ten. Act, merely on the basis of the plaint filed by the previous landlord as to which there may be a complete explanation, especially as I am excluding from my consideration the rent receipts and the road-cess returns on which the lower appellate Court strongly relied. I would therefore allow this appeal, set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the Court of first instance.

The appellant must have his costs throughout.

V.S./R.K.

Appeals allowed.

A. I. R. 1919 Patna 202

MULLICK AND JWALA PRASAD, JJ.

Braja Lall Dutta—Plaintiff—Appellant.

v.

Kenaram Pal — Defendant—Respondent.

Second Appeal No. 1152 of 1917, Decided on 13th February 1919, from a decision of Dist. Judge., Manbhum.

(a) Interpretation of Statutes—Retrospective effect—Amending Act without any express term is not retrospective.

The promulgation of an amending Act cannot without any express term take away from a party any right which might be vested in him under a prior Act. [P 202 C 2]

(b) Chota Nagpur Tenancy Act (1908), S. 47—S. 47 is not retrospective.

Section 47, Chota Nagpur Tenancy Act, has therefore no retrospective effect.

Plaintiff brought a suit on 15th June 1916 to enforce mortgage charge by the sale of a rayati interest under a mortgage executed on 16th June 1906:

Held: that S. 47 did not apply to the case and that the suit was therefore maintainable. [P 203 C 2]

Abaini Bhushan Mukerji and *Shishir Kumar Mitra*—for Appellant.

N. C. Ray, S. N. Dutt and *Panchanan Banerji*—for Respondent.

Mullick, J.—This second appeal arises out of a suit upon a mortgage executed

on 16th of June 1906 in the district of Manbhum. At that time the Tenancy Act applicable to the district was Act 10 of 1859. That Act was repealed by the Chota Nagpur Tenancy Act, 6 of 1908, so far as concerns the District of Manbhum on 22nd December 1909. The present suit was brought on 15th June 1916. In it the plaintiff prayed for the enforcement of the mortgage charge by sale. The Munsif, as well as the District Judge on appeal, dismissed the suit holding that under S. 47, Chota Nagpur Tenancy Act, no decree or order could be passed by any Court for the sale of the right of a raiyat in his holding. The plaintiff accordingly prefers the present second appeal. It is admitted that it is no longer possible, by reason of the six years' rule of limitation, to give the plaintiff a money decree for the debt and if he cannot get a decree for the sale of the holding, then the suit must be dismissed. The learned vakil for the appellant endeavoured to make a point that it had not been clearly held that the interest in question was that of a raiyat, but it is quite clear from the judgment of the lower appellate Court there is a conclusive finding of fact upon this point. The only question that remains is one of law, viz. whether S. 47, Chota Nagpur Tenancy Act, operates against the plaintiff.

On behalf of the appellant it is argued that the section cannot have retrospective effect, that the right to sell the property accrued at a time when the Act was not in force and being a vested right it is not affected by the subsequent enactment. Raliance is placed in support of this contention on the case of *Mrs. Vesta Clifton Sebastian v. Kuloda Prosad Deogharin* (1). In that case there was a transfer by sale of a raiyati holding in the district of Manbhum on 19th August 1909, that is to say, about four months before the Chota Nagpur Tenancy Act came into operation. The petitioner in the case was a claimant under S. 211, Chota Nagpur Tenancy Act, and contended that the sale had passed a good title to her and that she was entitled to maintain the claim. Their Lordships of the Calcutta High Court, giving effect to the general principle that the promulgation of an amending Act could not without any express terms take away from a party any rights which might be vested in him under a prior Act,

(1) [1910] 7 I. C. 763.

held that S. 46, Chota Nagpur Tenacy Act, which invalidates transfers of raiyati holdings except transfers made before the 1st January 1903, was not retrospective. The learned vakil for the appellant urges that by parity of reasoning S. 47 also should be so construed. Indeed in sub-Cl. (c) of that section there is an express saving in respect of decrees obtained before 1st January 1903, but the legislature has omitted to make any such provision in respect of rights which accrued between that date and 22nd December 1909. Whether the omission was accidental or intentional it is not our province to inquire. The only question to be determined is whether or not, under the principles applicable to the interpretation of statutes, S. 47 is to be given retrospective effect.

The learned counsel for the respondent relying upon the case of *Lakshmi Bibi Kujrani v Atal Behari Haldar* (2), contends that S. 47 is an absolute bar upon the Court. That case undoubtedly is very similar to the present case and decides that where a preliminary decree upon a mortgage executed before the passing of the Act has been obtained, a final decree for sale cannot be obtained by reason of the bar imposed by the statute. With very great respect it seems to me that their Lordships of the Calcutta High Court overlooked the principles which were applied by that Court in *Mrs. Sebastian's* case (1). The statute now under consideration is not one relating to procedure but infringes upon the rights of the subject and must therefore be strictly construed in aid of the subject. A like view was taken by their Lordships of the Bombay High Court in *Kalian Moti v. Pathubhai Faljibhai* (3) and *Nagar Pragji Jivabhai Bavaji* (4). In both cases a mortgage was executed before the Bombay Act 6 of 1888 came into force. Under that Act the decree passed upon the mortgage could not be enforced by sale without previously obtaining the sanction of the Government of Bombay. It was held that this restriction did not bind the Court so as to operate retrospectively. The general rule with regard to the operation of amending Acts retrospectively has been very clearly laid down by Jenkins, C. J., in a Full Bench of the

Calcutta High Court in *Gopeshwar Pal v. Jiban Chandra* (5). It is true that the Court in that case was concerned to decide a point of limitation, but their Lordships generally agreed to the proposition that in the absence of something putting the matter beyond doubt a Court should decline to put on an Act a construction that would deprive any person of a right of action vested in him at the time of passing the Act. The learned counsel on behalf of the respondent has endeavoured to restrict the operation of this rule by saying that the rule will apply where by reason of the amending Statute the right of suit is absolutely barred, but that where, after the passing of the amending Statute a reasonable interval is given for the exercise of the vested right, then the amending Act will operate. Their Lordships of the Calcutta High Court in the Full Bench decision above referred to, while holding that the amending Act could not apply in the first class of cases, declined to express any opinion as to the second class. That decision however dealt with a matter of limitation, which is essentially one of procedure. In the case before us the right in question is not one accorded by any rule of procedure but is a substantive right given to the mortgagee by the general law of property. S. 47, Act 6 of 1908 does not concern itself in any way with the procedure applicable to the execution of decrees.

In this view the principle applied in *Mrs. Sebastian's* case (1) should, in my opinion, be applied, and therefore the plaintiff is entitled to proceed to enforce his mortgage charge. The result is that the appeal is decreed with costs.

Jwala Prasad, J.—I agree.

v.S./R.K.

Appeal decreed.

(5) A. I. R. 1914 Cal. 806=41 Cal. 1125=24 I. C. 37 (F. B.).

A. I. R. 1919 Patna 203

JWALA PRASAD, J.

Saheb Tewari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 190 of 1917, Decided on 26th June 1917, from a decision of Second Class Magistrate, Arrah.

(a) Criminal P. C. (1898), Ss. 145, 146 and 195—Settlement of land attached under S. 146—Accused applying to subdivisional officer alleging that nazir had settled land fraudulently without holding auction as directed—Petition inquired into and found

(2) [1913] 40 Cal. 534.=21 I. C. 117.

(3) [1893] 17 Bom. 289.

(4) [1895] 19 Bom. 80.

false — Prosecution directed under S. 476 for offence under Penal Code, S. 182—Accused convicted—Settlement of land held not judicial proceeding and consequently prosecution of accused under S. 476 was not competent — But order by subdivisional officer could be treated as complaint on which cognizance of offence under Penal Code S. 182 could be taken—Failure to examine subdivisional officer as complainant was mere irregularity — Penal Code (1860), S. 182—Criminal P. C., Ss. 476, 200 and 537.

Certain lands having been attached by a subdivisional officer under S. 146, he ordered his nazir to proceed to the spot and settle the lands by auction. The nazir held the auction and reported the highest bid to the subdivisional officer. Subsequently the accused filed a petition before the subdivisional officer alleging that the nazir had settled the lands fraudulently without holding an auction. The subdivisional officer sent the petition to a Subdeputy Magistrate for inquiry and on the latter's report that the allegations contained in the petition were false, directed the prosecution of the accused under S. 476, Criminal P. C., for an offence under S. 182, I. P. C. The accused was tried and convicted of an offence under that section :

Held : (1) that the proceedings started by the subdivisional officer under S. 145 having terminated with the final order under S. 146 of the Code, the settlement of the attached lands was not a judicial proceeding ; (2) that therefore the complaint of the accused not having been made during the course of a judicial proceeding, the subdivisional officer was not competent to direct the prosecution of the accused under S. 476 ; (3) that the order made by the subdivisional officer should be treated as a complaint on which cognizance of an offence under S. 182, I. P. C., could be taken under S. 195, Cl. (1), Criminal P. C. ; (4) that the failure to examine the subdivisional officer as the complainant under S. 200 Criminal P. C., was a mere irregularity covered by S. 537 of the Code and did not vitiate the trial. [P 205 C 2 ; P 206 C 1]

(b) Criminal P. C. (1898). S. 200—Examination of complainant must be scrupulously observed—Omission to examine may not vitiate trial under exceptional circumstances.

The examination of a complainant under S. 200 is a very valuable safeguard which the legislature has provided and must be scrupulously observed and insisted upon, but under exceptional circumstances the omission to examine the complainant may not vitiate a trial. [P 206 C 1, 2]

Shivanandan Rai—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Judgment.—The petitioner has been convicted by Mr. Kaviraj, Second Class Magistrate of Arrah under S. 182, I. P. C., for filing a complaint containing false charges against a nazir of the Subdivisional Officer at Buxar. On appeal the District Magistrate of Shahabad has upheld the conviction by his order dated 6th March 1917. The petitioner seeks to have the conviction set aside. I

have given my best consideration to the contentions raised on behalf of the petitioner and I do not think that it is a fit case for interference by the High Court.

The facts appear to be as follows; Certain lands of a village called Nandpore were attached under S. 146, Criminal P. C., and were kept in the direct charge of the Magistrate himself, no receiver having been appointed by him under Cl. (2) of the section. The lands used to be settled by public auction. This year the bidding in Court was so low that the subdivisional officer refused to accept the highest offer and directed his nazir to hold a further auction on the spot. The nazir accordingly went to the place, held the auction and reported the highest bid that was offered. On 3rd November 1916 the subdivisional officer ordered as follows:

"Nazir's report seen. Rs. 50 is offered. There is no hope of further increase. Lands settled with Lal Mohar Missar for the year 1916-17."

On 4th November 1916 the petitioner Saheb Tewari filed a petition before the Subdivisional Officer at Buxar stating that the nazir had not been to the locality, and had not held any auction but had settled the lands with an uncle of the Nazarat Bukshi at Sadr (Arrah) fraudulently. The subdivisional officer passed the following order on that date:

"This is prima facie a complaint into the conduct of the nazir charging him with holding a mala fide auction of the attached land. The petitioner pays Rs. 7 as the costs of an inquiry. Let the Sub-deputy Magistrate hold a local and careful inquiry into the nazir's conduct and report."

The Subdeputy Magistrate who held the inquiry reported that the complaint of Saheb Tewari was false. Thereupon the subdivisional officer passed the following order on 15th November 1916:

"The Subdeputy Magistrate's report suggests very strongly that the petition against the nazir is false. Call on the petitioner to show cause on 28th November 1916 why he should not be prosecuted under S. 182, I. P. C., for lodging a false report against a Government officer."

On 28th November 1916 cause was shown by the petitioner. The subdivisional officer held that the cause shown was not sufficient and directed the prosecution of the accused petitioner by his order of 28th November 1916, in the following terms :

"I draw up a proceeding against the accused and order his prosecution for an offence under S. 182, I. P. C., and made over the record to the District Magistrate for disposal. The accused will give a personal recognizance of Rs. 200 to

appear in that Court when called on. Court Inspector to file a list of prosecution witnesses."

A formal proceeding under S. 476, was drawn up by the Subdivisional Magistrate and the accused was sent to the District Magistrate who on 12th December 1916, passed the following order: "To Sadr Subdivisional Officer for disposal." On 13th December 1916 the Sadr Subdivisional Officer made the following order: "Summon the accused and the prosecution witnesses for 4th January 1917."

On 4th January 1917 the Sadr Sub-Divisional Officer made over the case to Mr. Kaviraj for disposal. Mr. Kaviraj held the trial and convicted the accused by his order of 30th January 1917. The first contention of the petitioner before me has been that his petition of 4th November 1916 was not intended to cause any injury to the Nazir, but was only with a view to have the settlement cancelled and to obtain a settlement for himself and as such could not come under S. 182, I. P. C. This contention is on the face of it untenable. The Subdivisional Officer of Buxar was the immediate superior officer of the Nazir, and the auction held by the Nazir was in the capacity of a public servant and had the allegations made against him been found to be true by the Subdeputy Magistrate, the Nazir would have incurred serious punishment. The petitioner must have intended or at least must have known that the allegations made by him were likely to cause the Subdivisional officer (vide Cl. B of S. 182) to use his lawful power to the injury or annoyance of the Nazir. The allegations made in the petition have been held to be false. The petitioner is clearly guilty of an offence under S. 182, I. P. C.

The next contention of the petitioner is that the trial in this case was without jurisdiction inasmuch as the order of the subdivisional officer directing the prosecution of the petitioner under S. 476, Criminal P. C., was not passed in the course of a judicial proceeding. In the circumstances of this case I cannot allow the contention of the petitioner to prevail though I confess that there is great force in this contention. The order of the Subdivisional Officer of Buxar attaching the property in dispute under S. 146, Criminal P. C. was passed some years ago and the property was taken possession of

by the Magistrate and was being settled by him from time to time. The judicial proceeding instituted by the Magistrate under S. 145 terminated with the final order passed under S. 146. There was therefore no *lis* or any dispute pending between the parties before him. The settlement of the land is not in continuation of the proceeding taken under S. 145 or S. 146. In any case the settlement of the land by the Magistrate was not in the course of a judicial proceeding. The form of the order sheet used for the purpose of settlement is one prescribed by S. 4, R. 6 (A), of the Records Manual, and as a matter of fact this was the form used by the Subdivisional Officer of Buxar while settling the lands concerned. The order sheet used by him is not one prescribed for the Magisterial records and is not a continuation of the order under S. 146. It is well to quote the observation made in *Hara Charn Mookerjee v. King Emperor* (1):

"That the judicial proceeding in the case determined when the Munsif finally decided the case, there being no further question left for determination as to the right of the parties to the suit upon which evidence could have been legally taken, that the obstruction was not therefore brought to the notice of the Munsif in the course of a judicial proceeding, and that he had no jurisdiction under S. 476, Criminal P. C., to hold an inquiry."

I therefore hold that the complaint of the petitioner against the Nazir to the subdivisional officer was not made in the course of the judicial proceeding. The case of *Emperor v. Kuna Sgh* (2) does not apply to this case for the order under S. 476 in that case was passed by the District Magistrate who, under the order of the Deputy Commissioner had held the inquiry into the allegation of extortion made against the Peshkar of the Deputy Commissioner. In this case the order is not made by the Subdeputy Magistrate who enquired into the complaint of the petitioner but by the subdivisional officer who did not inquire into it. In the second place the allegations against the Peshkar in that case were those of extortion which was an offence committed under the Indian Penal Code, whereas in the present case the allegation against the Nazir is that of holding a fraudulent sale. But the trial in this case can be justified on other grounds. Under S. 195, Cl. (1), cognizance of an

(1) [1903] 32 Cal. 367.

(2) [1905] 28 All. 89.

offence under S. 182, I. P. C., can be taken on the complaint of the public servant concerned or some public servant to whom he is subordinate.

The Subdivisional Officer of Buxar, as well as the District Magistrate of Shahabad, were therefore competent to institute a prosecution on their own complaint. The proceeding under S. 146, drawn up by the Sub-divisional Officer and his order dated 28th November 1916, sending the record to the District Magistrate for action and disposal amount to a complaint made by him. The District Magistrate was competent to make over the case to the Sadar SubDivisional Officer for disposal. The Sadar Subdivisional Officer according to the report of the District Magistrate, was authorized under S. 192, Cl. 2, to transfer the case to the Subordinate Magistrate who held the trial in the case. The view is supported by the ruling reported as *Emperor v. Sundar Sarup* (3), the facts of which appear to be very much similar to the present case. Treating the order of the Subdivisional Officer of Buxar as a complaint, it may be contended that the officer should have been examined on oath as is required by S. 200, Criminal P. C., but it has been held by almost all the High Courts that an omission to examine the complainant will not render the trial null and void, and that it is an irregularity which is covered by S. 537, Criminal P. C.

The rulings reported as *Queen-Empress v. Monu* (4), *Girdhari Lal v. Emperor* (5) and *Queen-Empress v. Murphy* (6) support this view. There is not the faintest suggestion that the accused was in any way prejudiced by the irregularities complained of. I should not be understood to suggest that the examination of the complainant under S. 200, Criminal P. C., is not essential or important. It is a very valuable safeguard that the legislature has provided and must be scrupulously observed and insisted upon. The petitions of complaint are not drafted by the complainants themselves and it is therefore necessary that before action is taken upon written complaints filed in Court, the complainants should be examined on oath, under S. 200, but under exceptional circum-

stances the omission may not vitiate a trial. In a case like the present one, where the Subdivisional Officer has upon an enquiry by his subordinate officer satisfied himself as to the falsity of the allegations made against his Nazir and has formally recorded an order under S. 476, giving necessary particulars required for a complaint, there does not appear to any sound reason for setting aside the trial and the conviction on the ground that the Subdivisional Officer himself was not examined on oath. The inquiry in this case was held in the first instance by a Subdeputy Magistrate, who came to the conclusion that the complaint of the petitioner was false. The trial has been very thorough and detailed and the evidence of both sides was fully gone into in the Court below.

The objections now raised by the accused do not appear to have been taken in the Courts below and there is no reference to them in the grounds of appeal to the District Magistrate, nor do they appear to have been taken before him in the argument, as the judgment is silent on them. The accused allowed the prosecution to go on without any demur and when the trial, which may be said to be a somewhat prolonged one, ended in his conviction, he thought it fit to take this objection for the first time in this Court. Such objections cannot be allowed at this stage to prevail. It will not in any way further the ends of justice to set aside the trial at this stage on technical grounds urged by the petitioner, though I must say that it is much to be regretted that the Subdivisional Officer of Buxar did not realize that the proper course in this case would have been to give sanction under S. 195-A, Criminal P. C., to the Nazir to prosecute the accused. I would refer to the observations of Sir Richard Harington, J., at p. 523, (of 15 C. L. J.) and of Sir Ashutosh Mookerjee, J., at p. 581 (of 15 C. L. J.) in the case of *Pulin Behari Das v. Emperor* (7). In the view that I take in this case the application is refused.

V.S./R.K. *Application dismissed.*

(7) [1912] 16 I. C. 257.

(3) [1904] 26 All. 514.

(4) [1888] 11 Mad. 443.

(5) [1911] 11 P. R. 1911 Cr.=10 I. C. 156.

(6) [1887] 9 All. 666.

A. I. R. 1919 Patna 207

ATKINSON AND JWALA PRASAD, JJ.

Bhikhad Bhunjan Narain Tewari —
Defendant—Appellant.

v.

Upendra Nath Roy and others—Plain-
tiffs—Respondents.Second Appeals Nos. 938 and 1212 of
1917 and 422 of 1918, Decided on 23rd
May 1919, from decision of Judicial
Commissioner, Chota Nagpur.**Adverse Possession—Evidence adduced as
to possession insufficient — Presumption is
that possession follows title—Possession.**Where in a suit for possession no evidence as
to possession is given by either side or the evi-
dence adduced is so unsatisfactory or insufficient
as to leave the Court unable to arrive at a clear
conclusion as to which party is in possession,
the presumption is that possession follows title.

[P 209 C 1]

*Naresh Chandra Roy, Sushil Madhab
Mullick and Sarat Chandra Roy*—for
Appellant.*Hasan Imam and Naba Kumar Chow-
dhury*—for Respondents.**Judgment.**—These three second ap-
peals come before us from the decision
of the learned Judicial Commissioner of
Chota Nagpur. With regard to Second
Appeal No. 1212 Mr. Sushil Madhab
Mullick, who appears on behalf of the
appellants, admits that having regard to
the finding of fact arrived at by the
learned Judicial Commissioner this ap-
peal cannot be sustained. Accordingly
Second Appeal No. 1212 of 1917 will
stand dismissed with costs. The two
remaining appeals are Nos. 938 of 1917
and 422 of 1918. The point arising for
decision is common to both appeals and
consequently both these second appeals
will be disposed of by one judgment.
Two villages by name Haisathu and Har-
chanda formed property which belonged
to the members of a joint Hindu family
and the family was composed of three
persons Kirpal, Beni and Harihar. In
1891 Harihar instituted a suit for parti-
tion and on 27th February 1893 a preli-
minary decree for partition was passed.On 18th May 1893 the interest of the
cosharers in both the villages was sold by
auction in execution of a decree procured
at the instance of three persons against
all the cosharers and what formerly
constituted the joint family property
was sold and purchased by one Jaipal at
the execution sale. It will be noticed
that the sale in pursuance of the decree
took place during the currency of thepartition suit. On 13th September 1895
the final decree for partition was pro-
nounced and the shares of the respective
cosharers were allotted to each. At the
execution sale, at which Jaipal was de-
clared the purchaser, it was conceded
that Jaipal bought as a benamidar on be-
half of all the original cosharers. It
was at one time contended that Jaipal
in fact became the purchaser on behalf
of the widow of Kirpal but the learned
Judge has found as a fact that the pur-
chase by Jaipal was really made on be-
half of all the cosharers. This issue was
determined in Second Appeal No. 1212
of 1917, and with this matter we are not
now concerned. Between 21st April and
22nd May 1896 symbolical possession
was given to all the cosharers of the
respective takhtas allotted to them in
pursuance of the partition. On 22nd
February 1898 Jaipal obtained his sale
certificate in respect of the aforesaid pur-
chase by him at the execution sale and
symbolical possession was given to him
of both villages referred to above on
17th April 1898. On 15th January 1900
the shares of Beni and Harihar in Mauza
Haisathu were sold at an auction sale,
and purchased by the plaintiffs' father
one Baikuntha Nath Rai, in pursuance
of another mortgage decree. What was
sold was five annas four pies of Mauza
Haisathu and on 15th May 1900 an ad-
ditional five annas four pies share of
Haisathu was again sold in pursuance of
a different decree and 10 annas 8 pies
of Mauza Harchanda.The sale to the plaintiffs' father was
effected on 15th January 1900 in respect
of the first lot of property sold and in
respect of the second lot of property
sold the same was purchased on 5th May
1900 by the plaintiff's father. The first
sale was made absolute on 1st February
1900 and the second sale was made abso-
lute on 21st July 1900 and symbolical
possession was given to the plaintiffs'
father as purchaser in respect of both de-
nominations of property specified above on
8th and 9th November 1900 respectively.
The Record of Rights was published on
23rd December 1900 and defendant 2
was recorded as proprietor in respect of
certain plots comprised within the said
mauzas, forming part of the property
purchased as aforesaid by the plaintiffs'
father as representative of Kirpal's branch
of what was originally the joint family

and at the same time the Record of Rights contained an entry that certain plots within the said mauzas, being portions of the said properties purchased by Baikuntha Nath Rai were also recorded in the name of the plaintiffs. Kirpal's branch of the original joint family instituted a suit seeking to have the entry in the Record-of-rights amended in so far as it recorded the plots in the name of the plaintiffs or of the plaintiffs' father. A counter suit was instituted by the plaintiffs claiming like relief in so far as the plots that were recorded were recorded in the name of Kirpal and his branch of the family. These are the facts out of which the present second appeals arise and it may be stated that the point for consideration in both these second appeals, viz., No. 938 of 1917 and Second Appeal No. 422 of 1918, are exactly similar and that one judgment will be common to both.

The point for legal determination is a short and narrow one and may be briefly stated, viz.: Is the plaintiffs' Original Suit No. 386 of 1912, out of which Second Appeal No. 938 of 1917 has arisen barred by limitation and consequently are the plaintiffs not now entitled to recover possession of the property for which they sue? Defendant 2, who is the appellant contends that the plaintiffs have failed to discharge the onus which the law casts upon a plaintiff in a suit suing for the recovery of possession of land by proving possession and dispossession by himself or those through whom he claims within 12 years before action brought. The learned Judicial Commissioner addressed himself to a consideration of the evidence for the purpose of ascertaining if the plaintiffs had established possession of the lands in suit either by themselves or those through whom they claimed within the 12 years before the institution of this suit. From the judgment the facts relative to a consideration of this point appear to be as follows. After the partition was effected a question arose between Kirpal's branch of the family and the branches represented by Beni and Harihar as to whether Kirpal's branch had by adverse possession acquired title to the respective shares of Beni and Harihar. The learned Judge considered the evidence adduced on both sides and in his opinion the vital question for

consideration and determination was the question as to who had possession during the period from 1896 to November 1900. Kirpal's branch of the family were claiming a title by adverse possession whereas Beni and Harihar claimed that the possession which they acquired in pursuance of the batwara decree had never ceased and that their possession was intact and unimpaired.

The learned Judge confesses that the evidence on both sides with regard to possession, as adduced before him, was most unsatisfactory and that he was quite unable to make up his mind with whom possession in fact lay; and accordingly to arrive at a definite and final conclusion, the learned Judge applied the legal presumption that possession follows title to the facts proved in evidence before him, and held that the possession of the property in this suit lay with Beni and Harihar between the period from 1896 up to November 1900. The learned Judge summarizes his conclusion of fact in the following phrases:

"My opinion then about the 1896 to 1900 period is that the direct evidence is insufficient to prove with whom possession lay. When this position is reached a long series of rulings show that it should be presumed that possession goes with title. The title of Beni and Harihar is, in my opinion, established by the partition proceedings. These as I have held were continued as though Jaipal's purchase in 1893 had not taken place. I thus find that Beni and Harihar were in actual possession from 1896 up to November 1900 when the Roys got symbolical possession."

Now if the learned Judge was right in point of law in applying the legal presumption that possession follows title, then the final conclusion of fact arrived at by the learned Judge cannot be impeached in second appeal. Mr. Shushil Madhab Mullick appearing on behalf of the appellant contends that the learned Judge in the circumstances of this case, on the facts proved in evidence before him, was not warranted in applying in point of law the presumption that possession follows title. His contention before us has been that this presumption of law is only applicable in cases where the evidence is so strong and so consistent and so evenly balanced on both sides that the Court is unable to satisfy itself with which of the parties to the litigation before it possession lies; and that only in such cases is the Court entitled to apply the presumption of title

in aid of possession. Mr. Mullick emphatically argues that the presumption cannot be applied in cases where no evidence of possession is given at all by either side; or where if the evidence that is given as to possession is so unsatisfactory and insufficient as to leave the Court unable to arrive at a clear conclusion as to with which party possession in fact lay.

We are of opinion that Mr. Mullick's contention is unfounded in point of law. There are many authorities of modern and recent date, which conclusively establish that even in cases where no evidence has been given at all as to possession that nevertheless the legal presumption may be resorted to to support the presumption that possession follows title, and likewise there are also reported cases which decide that where the evidence offered has been so unsatisfactory and weak on both sides as to leave the tribunal of fact unable to determine the issue of fact as to which of the parties to the litigation are entitled to possession, that in such cases the presumption that possession follows title may be resorted to to determine the issue as to possession in fact.

The main authority on which Mr. Sushil Madhab Mullick relies is a judgment of our learned brother Mullick, J., reported as *Fakira Lal Sahu v. Munshi Ram Charan Lal* (1). In that case on the facts before him, our learned brother did lay down that the legal presumption that possession follows title was applicable only in cases in which the evidence was so strong and consistent and evenly balanced on both sides that it was impossible to determine with whom possession lay. However in a more modern ruling the same learned Judge reconsidered the decision pronounced by him as a single Judge in second appeal (unreported) No. 728 of 1917. Mullick, J., was sitting, in the unreported case cited, as a member of a Division Bench of this Court with my learned colleague Jwala Prasad, J., Mullick, J. in that case stated:

"We think it right however to state what, in our opinion, the law is with regard to the presumption which follows upon proof of title. The ordinary presumption of law is that possession goes with title. That presumption of course does not avail if there is clear evidence to the contrary. Where the evidence is equally strong on both

sides, the presumption of law may, according to the circumstances of each case, be regarded and turn the scale. But the presumption cannot overcome the facts proved, and therefore it is always open to the Court to give what weight it likes to the presumption. When there is no evidence of possession on either side, the presumption should prevail. So also where the evidence is unsatisfactory on both sides, provided always that the evidence does not negative the presumption."

With the expression of the law so stated we entirely agree. Likewise it will be found stated in Woodroffe, J's book on the Law of Evidence, p. 692, of the last edition, as follows:

"It is therefore only when there is no evidence of possession either way, or when the evidence of possession is strong on both sides and apparently equally balanced, that the presumption that possession goes with title should prevail."

The importance of that commentary, coming from so distinguished an authority as Woodroffe, J., is that it recognizes that even in cases where no evidence is given on either side as to the fact of possession that the presumption should prevail. Mookerjee, J., in a case reported as *Mirza Shamsheer Bahadur v. Munshi Kunj Behari Lal* (2) states at p. 280 as follows:

"When the District Judge deals with this part of the case, he may, if the state of the evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in *Ranjeet Ram Panday v. Gobardhun Ram Panday* (3), namely where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner."

The importance of this judicial pronouncement is that it applies to the third class of cases, namely where the evidence on both sides is so unsatisfactory or insufficient as to be inadequate to enable the Court to make up its mind as to with whom possession lies, that then the principle laid down by their Lordships of the Privy Council in the well-known case reported as *Ranjeet Ram Panday v. Goburdhun Ram Panday* (3) should be applied. I also think the decision of their Lordships of the Privy Council reported as *Rani Hemanta Kumari Debi v. Maharaja Jogadindra Nath Roy Bahadur* (4) brings up to date what the law is as declared by their Lordships' Board, namely that where the evidence as to possession is doubtful and conflicting, the initial fact of title comes to a party's aid with greater or less force according

(2) [1908] 12 C. W. N. 273.

(3) [1875] 20 W. R. 25 (P. C.).

(4) [1906] 10 C. W. N. 630 (P. C.).

(1) [1916] 35 I. C. 554.

to the circumstances established in evidence. Mookerjee, J., subscribes to this view in the case already cited reported as *Mirza Shamsheer Bahadur v. Munshi Kunj Behari Lal* (2). In that case the learned Judge says at p. 281:

"It follows consequently that if a plaintiff establishes by evidence, direct or presumptive, his possession, actual or constructive, of the disputed land in Bharkalwar within 12 years of the suit, and if the defendants are called upon to prove their case of adverse possession for over 12 years, in respect of any portion of those lands, the evidence as to their possession must be carefully scrutinized."

In our opinion in point of law the learned Judge was on the facts of this case justified in applying to the facts adduced before him in evidence in this suit the presumption already stated that possession follows title. The learned Judge's finding of fact is that from 1896 down to 8th or 9th November 1900 respectively the predecessors-in-title of the plaintiff, Beni and Harihar, were in possession of the respective lands in suit; and that consequently the present suits having been instituted on 7th and 9th October 1912, the plaintiff has shown that he was in possession within 12 years before action brought, and that defendant 2's present possession must be attributed to a dispossession or a discontinuance of the plaintiff's prior possession within the period provided by the Limitation Act. It remains to consider which article of the Limitation Act applies to this case. It has been forcibly contended before us that the articles which apply are either Art. 137 or Art. 138. We are of opinion that neither of these articles apply; and the article which does apply is Art. 142.

Article 138 applies only to the case of a judgment-debtor or those claiming through him who remain in possession after purchase made by an auction purchaser at an execution sale. In the present case defendant 2 bases his claim to title and possession as a trespasser relying upon adverse possession. Art. 137 for obvious reasons has no application to the facts of this case, because as found by the learned Judge possession remained with the predecessors-in-title of the plaintiff up to the time that symbolical possession was given to the plaintiff. Accordingly we are of opinion that the learned Judge was right in point of law in the conclusion at which he arrived

that the plaintiffs discharged the onus which the law imposed upon them in proving their possession and dispossession or discontinuance of possession within 12 years prior to the institution of these suits respectively. We therefore decline in second appeal to interfere with the decision of the learned Judge, and dismiss these appeals with costs.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 210

ROE, J.

Andrew Yule and Co. and others—
Petitioners.

v.

A. H. Skone and others — Opposite Parties.

Criminal Revn. No. 439 of 1918, Decided on 14th January 1919, from order of Dist. Magistrate, Chota Nagpur.

Criminal P. C., (1898), S. 145—Mining rights.

Mining rights fall within the definition of the term land in S. 145. [P 212 C 1]

P. R. Das, S. N. Palit and Sushil M. Mullick—for Petitioners.

Hasan Imam and H. L. Nandkeolyar—for Opposite Parties.

Judgment.—The facts of this case have been most clearly stated in the admirable judgment of the learned Deputy Magistrate, Mr. Kshitish Chandra Sarkar. They are that there is in the estate of the Maharaja of Chota Nagpur a village, named Keri, of which one of the Tolas is Bhageya. The village excluding the Tola of Bhageya was given in Brahmottar to one of the priestly caste many years ago and was later the subject of a lease by the Brahmottadar to one Pickard. That lease contemplated the actual holding in direct possession of all fallow lands within the area covered by the lease and also the right to the minerals lying beneath the surface of the land covered by the lease. It has been found as a fact that Mr. Pickard made boring and sent coal obtained by such borings to Calcutta for analysis and that he sank a shaft which is still in existence and generally speaking, exercised, up to the time when he gave a lease to one Skone, the right granted to him under the lease given by the Brahmottadar. It has been found as a fact that after Pickard transferred his rights to the Skones, the present second party, that

second party continued to be in direct possession of the property, which was the subject of the lease given by the Brahmottadar, up to the year 1912. In 1914, in view no doubt of the decision of the Judicial Committee that presumably a Brahmottadar has no power to dispose of anything below the surface granted to him, Messrs. Andrew Yule and Co. obtained a grant of the mining rights of the whole of Mouzah Keri from the Maharaja of Chota Nagpur and the Kumar, who had certain rights as a Khorposhdar in the village. In pursuance of the title conveyed by the lease granted by the Maharaja and the Kumar, Andrew Yule and Co. built a bungalow in Tola Bhageya and began to take coal from certain outcrops, which the learned Deputy Magistrate has distinctly found to be a part of the Tola Bhageya. They also made preparations for entering upon all the other Tolas of village Keri with a view to enforce the right to dig for coal therein. Upon this it was reported by the police that a breach of the peace was imminent. The Magistrate thereupon issued proceedings under S. 145, Criminal P. C. and after investigating the question whether a breach of the peace was imminent or not came to the conclusion that but for his action there would have been a breach of the peace. He thereupon decided that on the strength of the undisputed possession up to 1912 and the absence of any evidence of a disturbance of the possession between 1912 and the date of the proceedings, the second party was entitled to an order restraining the first party from interfering with his possession in the village Keri, excluding the Tola of Bhageya to which the second party made no claim. Against that order an application was presented by Mr. Das for the setting aside of the order, on the ground that it was made without jurisdiction. This application was admitted and now comes before me for disposal.

The first point taken by Mr. Das is, that the Magistrate, having been required by S. 145 to decide who was in actual possession of the property, was required to come to a finding as to who was in possession at the time on the actual date of the issue of his order or two months prior thereto; and that in deciding only who was in possession five years prior to that order, he failed to exercise the juris-

diction vested in him by law and has not in fact disposed of the case at all. The order therefore being made without a proper determination of the real issue in the case, should be set aside.

The second line taken by Mr. Das is, that in accordance with the universal rule of civil law, where title and possession go together over a part of the property, the possession over a part is possession over the whole property covered by the title. The learned Magistrate has himself recorded that probably the civil Courts will now hold that Andrew Yule and Co., who were the first party, had a better title than the second party. On the strength of that decision it is argued that the decision that Andrew Yule and Co. being in possession of Bhageya, a part of the property covered by their title, and having admittedly a good title over the whole of Keri, the possession of Bhageya, is in the eye of the law, possession of the whole village Keri, and that, therefore an order made upon this finding should have been in favour of Andrew Yule and Co. and that the order made against Andrew Yule and Co. was, on the finding without jurisdiction. Thirdly, it is argued that the Magistrate had no jurisdiction to enter into these proceedings at all, and that if indeed mining rights can be the subject of proceedings under Ch. 12, Criminal P. C., they should be taken under S. 147, which is expressly designed for a consideration of the rights claimed by persons not as owners of the property in dispute, but as claiming a subservient right to use the property in dispute in a particular manner.

I should not personally be prepared to enter at all upon either of the questions raised by the first two arguments put forward by Mr. Das. It has always been my view that, when a Magistrate has jurisdiction to take cognizance of a case and devotes his judicial mind to a consideration of the points which he is required to determine, any error of law with regard to the interpretation of the words of the section which he is applying is not an error in the exercise of his jurisdiction but an error which would in the ordinary course be subject to an appeal. Such errors are not subject to superintendence, but inasmuch as there are instances in which the Courts have interfered with matters of this descrip-

tion upon a hypothesis, that if possession is not legally sufficient to warrant an order under S. 145, the granting of the order is made without jurisdiction. I would note briefly that on these two points the Magistrate has not, in my view, committed even a legal error. The Court has found as a fact that Mr. Pickard made a shaft and was in possession of it up to the year 1912. That shaft is still in existence and no one has done anything to put Mr. Pickard or his successors out of possession. Possession was taken under what seemed at the time an undisputed title and possession acquired in such circumstances would continue to be a legal possession until destroyed by some overt act. It has been found as a fact that this act of possession, the making of a shaft, is the only act of possession that has ever been committed on so much of the property as was covered by Mr. Pickard's lease. This finding, in my opinion, furnished good ground for holding that on the date of the order under S. 145, Pickard's successor was in possession of the property covered by this title.

It remains to discuss whether a mining right comes within the provisions of S. 145 or S. 147. The matter has been argued in this Court upon the basis of an analogy between mining rights and rights exercised by other classes of persons entitled to make use of land not belonging to themselves. I am of opinion that upon a plain reading of the words of the section, mining rights must reasonably be regarded as falling within the definition of the term land. It will be remembered that in the earlier Code, S. 530 ran very much in the same terms as the present S. 145, that is to say, that the old section gave jurisdiction to a Magistrate in a case of all disputes concerning land or the boundaries of land within the limitation of his jurisdiction. In the intermediate Code, that of 1878, the words house, water, fisheries, crops and other produce of land were omitted and the section ran "disputes concerning any tangible immovable property or the boundaries thereof;" and on the strength of this alteration in the law, Field, J., Beverley, J., concurring, held in the case of *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharji* (1) that the Code must now

(1) [1885] 11 Cal. 413.

be regarded as limited to actual tangible property and not to incorporeal rights exercisable over such property. This was followed by MacDonell, J., Beverley, J., concurring, in the case of *Krishna Dhone Dutt v. Troilokia Nath Biswas* (2). These two decisions were frequently followed in the Court in Calcutta with the result that in 1898 the framers of the new Code found it necessary to reinstate in the Code of 1898 the words omitted from the Code of 1878. It follows, I think, on this consideration of the law, that the present S. 145 is intended to cover all profits derivable from land or water, and in particular fisheries as providing profits taken from water. Surely if a fishery be regarded as yielding a profit to be taken from water, a mining right must be regarded as yielding a profit to be taken from land.

I decline therefore to interfere with the orders made by the learned Deputy Magistrate and reject this application.

V.S./R.K. *Application rejected.*

(2) [1886] 12 Cal. 539.

A. I. R. 1919 Patna 212

ATKINSON AND JWALA PRASAD, JJ.
Mathura Prasad Singh and another—
Petitioners.

v.

Emperor—Opposite Party.

Civil Criminal Revns. Nos. 8 and 9 of 1919, Decided on 30th May 1919, against order of Certificate Officer, Patna, D/- 20th March 1919.

Criminal P. C. (1898), S. 476—Certificate Officer, acting under Bihar and Orissa Public Demands Recovery Act, acts as Revenue Court and is competent to make order under S. 476.

A Certificate Officer, when acting in the discharge of his duties under the Bihar and Orissa Public Demands Recovery Act 1914, acts as a Court, and while so acting he is a Revenue Officer presiding over a Revenue Court and as such is competent to make an order under S. 476, Criminal P. C. [P 215 C 1]

*Jalagobind Prasad and Atul Krishna Roy—*for Petitioners.

*Asstt. Govt. Advocate—*for the Crown.

Facts of the case are fully set out in the judgment of the High Court. The case originally was heard by Das, J., who passed the following order, dated 16th May 1919:

"One of the questions raised in this application is whether a Certificate Officer who has drawn up proceedings under S. 476, Criminal P. C., in connexion with an enquiry under the Road Cess

Act is a 'Court' and whether the matter came before him in the course of a 'judicial proceeding' within the meaning of S. 476, Criminal P. C. Mr. P. K. Sen on behalf of the petitioner says that there is no direct authority covering this point. I think the matter is an important one and should be disposed of by a Division Bench."

The case was then argued before the Division Bench.

Judgment. — Revisional Applications Nos. 8 and 9 of 1919 come before us in Civil Criminal Revision from an order of the Certificate Officer under the Public Demands Recovery Act sanctioning the prosecution of the petitioners before us pursuant to his order of 20th March 1919. The petitioners are Mathura Prasad Singh and Kunj Behari Singh. The sanction to prosecute was granted by the order of the Certificate Officer, dated the 20th March, for offences alleged to have been committed by the petitioners under Ss. 471 and 465, I. P. C. The petitioners appear in this Court before us in Civil Criminal Revision under the provisions of S. 115, Civil P. C., by separate petitions. Mathura Prasad Singh's petition is No. 8 of 1919 and Kunj Behari Singh's petition is No. 9 of 1919. These two persons are cosharers of certain Lakhraj revenue-free land situate in the District of Patna. The land in their joint occupation is liable to road-cess, and the respective cosharers have in times past mutually discharged their obligations in certain proportions. The total road-cess leviable per annum is Rs. 14-8-0. Mathura Prasad Singh contends that his share of the road-cess amounts to Rupees 3-12-0 and that the balance Rs. 10-12-0 is properly payable by Kunj Behari.

Mathura Prasad alleges that he has been paying more than his fair share, inasmuch as he contends that the fair and proper proportion of road-cess which he should pay is the sum of Rs. 3-12-0. The total annual road cess payable by both the cosharers in respect of the entire land is the sum of Rs. 14-8-0. This amount is payable by the two half yearly kists, one in January and one in June of each year, and the half yearly amount is Rs. 7-4-0 for each kist. Mathura Singh undertook as between the cosharers the liability of discharging in the month of May the road-cess due for the January kist; and accordingly he went to the Collectorate and defrayed the liability by a money order for Rs. 6-8-0 but on being

informed that the amount due was Rupees 7-4-0, that there was a shortage between the amount of the money order and the actual amount due for road-cess, Mathura paid up the difference and received a challan for 12 annas. The money was paid in May, and nothing further occurred until December 1918.

On 12th December 1918 the Certificate Officer issued a certificate in pursuance of the Bihar and Orissa Public Demands Recovery Act 1914, claiming from the petitioners as cosharers the amount due for the June kist, viz., Rs. 7-4-0; and on 16th December 1918 Kunj Behari who was liable to pay the road-cess for the June kist filed a petition, dated 16th December 1918, in which he alleged that the money due for the road-cess for the June kist had in fact been paid; and he produced a money order receipt for Rs. 6-8-0 and a challan for Rs. 7-12-0—adding these two sums together they would make Rs. 14-4-0, which would be the total amount of the road-cess due for the entire year in respect of the two half yearly kists for January and June.

Upon this petition being filed the Certificate Officer directed an inquiry to be made in his office with a view of testing the bona fides of the case made by Kunj Behari. It is right to say that the petition filed by Kunj Behari on 16th December 1918 was a petition on behalf of himself and Mathura; but he, Kunj Behari, was the person who alone signed the petition and filed the petition. A report by the office to the Certificate Officer clearly demonstrated that the challan that was produced and relied upon by Kunj Behari had been altered in such a way as to make it appear that Rs. 7-12-0 had been paid whereas in truth and in fact only 0-12-0 had been paid; and that therefore the challan relied upon in the petition of Kunj Behari, dated 16th December 1918 was in fact alleged to be a forgery. It is stated that the challan referred to in the petition of Kunj Behari was in fact the challan issued to Mathura for 12 annas in respect of the payment of road-cess which he made in the month of May for the January kist; and the cosharers had fraudulently altered the challan to make it appear as a receipt for Rs. 7-12-0 instead of 12 annas. The learned Certificate Officer called upon Kunj Behari to show cause why he should not be prosecuted.

Kunj Behari did show cause; and called some five or six witnesses on his behalf. The learned Certificate Officer was satisfied that there was a *prima facie* case against the petitioner sufficiently strong to justify the prosecution of Kunj Behari and he also came to the conclusion that inasmuch as Mathura was a party to the petition and one of the persons on whose behalf the petition was filed, that he too should be prosecuted and that under the circumstances it was not necessary to call upon Mathura individually to show cause why proceedings should not be instituted against him. Accordingly on these facts the two petitioners Mathura Prasad Singh and Kunj Behari Singh now apply to this Court and seek to challenge the authority and power of the Certificate Officer to sanction their prosecution under the provisions of S. 476, Criminal P. C.

It is contended, firstly, that the Certificate Officer is not a Court; and secondly, that if a Court, he is not a Revenue Court; and thirdly, that if the Certificate Officer be a Court, and a Revenue Court, that then the matters in connexion with the sanction granted by him under S. 476 did not come before him in the course of a judicial proceeding. Now these applications originally came before my learned brother Das, J., and he thought that the matters arising for decision require careful consideration, and he directed that the Government should be served with notice of these applications. It was fortunate that he adopted this course, because on the previous occasion it was asserted that the question for determination depended upon the construction of the old Public Demands Recovery Act of 1895. As a matter of fact that Act has been repealed in its application to this Province by S. 2, Bihar and Orissa Act 4 of 1914; and by this new Act dealing with the recovery of public demands, and various other demands specified in the schedule thereto a complete and extensive code has been provided; and the rights of the parties and of the Courts constituted and appointed to determine such rights have been fully and clearly defined; and by virtue of the Bihar and Orissa Public Demands Recovery Act 1914 the entire substance of the respective petitioners' contention, as formally presented to us, is without foundation. The Bihar and Orissa Act

defines what are the functions of a Certificate Officer, and by S. 58 it is provided that

"a Certificate Officer shall have the powers of a civil Court for the purpose of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents."

Section 66 of the same Act provides that

"a Certificate Officer shall be deemed to be a Court, and any proceeding before him shall be deemed to be a civil proceeding within the meaning of S. 14, Lim. Act."

Section 57 enacts that

"a Certificate Officer acting in discharge of his duty under this Act shall be deemed to be acting judicially within the meaning of the Judicial Officers' Protection Act of 1850."

There can be no question now that a Certificate Officer under the powers conferred upon him by the Bihar and Orissa Public Demands Recovery Act, 1914, for the recovery of a public demand, or adjudicating upon a petition filed in respect thereof by a person upon whom a demand is made, is, while acting in such capacity, a Court. The question remains to be considered, what kind of Court it is? S. 476, Criminal P. C., vests civil, criminal and Revenue Courts with the right to exercise the powers conferred by S. 476, Criminal P. C. S. 60, Bihar and Orissa Public Demands Recovery Act, 1914, seems to indicate very clearly that a Certificate Officer is a Revenue Officer; and while acting judicially as a Revenue Officer his decisions are subject to review by the Collector, the Commissioner and eventually by the Board of Revenue. Appeals lie from the Certificate Officer to the Collector and the Commissioner; and decisions of the Certificate Officer and the Collector and the Commissioner are all capable of being reviewed and reconsidered by the Board of Revenue by virtue of S. 62 of the Act.

Appended to the schedule of the Act itself is a list showing the classes of public demands which may be recovered by Certificate Officers in pursuance of the Bihar and Orissa Public Demands Recovery Act, 1914, as applied to this Province, in their capacity as Revenue Officers, recovering items of revenue; and amongst the enumerations will be found arrears of road cess and public works cess. We have no doubt whatsoever that a Certificate Officer is a Court while acting in discharge of his duties under the Bihar and Orissa Public Demands

Recovery Act, 1914, and that while so acting as a Court he is an officer presiding over a Revenue Court for the purpose of recovering all the claims specified in the schedule to the Act as revenue claims, and that in such capacity he comes within the provisions of S. 476, Criminal P. C. It only remains to consider whether the matters referred to were brought to the Certificate Officer's notice in the course of a judicial proceeding within the meaning of S. 476, Criminal P. C. We are of opinion that they were. An issue was raised directly by the petitioner Kunj Behari on 16th December 1918. The petition alleged payment, and it became necessary for the Certificate Officer to inquire in his office as to the validity of the case alleged by the petition. The petition initiated a necessary judicial inquiry; inasmuch as the petitioner claimed to seek exoneration from payment of the June kist of road-cess claimed by the certificate issued on 12th December 1918 by the Certificate Officer. Thus there was a clear *lis* pending for determination as to the fact of payment of the road-cess claimed, as alleged by the petition. Therefore we think there is no substance in any of the three points raised on behalf of the petitioners respectively; and that the Certificate Officer was competent to direct the prosecution of the petitioners under the powers vested in him by S. 476, Criminal P. C.

However we think there is a distinction between the case of Mathura Prasad Singh and the case of Kunj Behari Singh. Kunj Behari Singh was given an opportunity of showing cause why he should not be prosecuted; on the other hand Mathura Prasad Singh was given no opportunity of showing cause. Strictly speaking, it is not necessary that notice should be given to show cause; but in this case we feel that some prejudice might be done to Mathura Prasad Singh if he does not have an opportunity of dissipating the suspicion attaching to him from the *prima facie* case which has been established as against Kunj Behari Singh. The learned Certificate Officer in the explanation which he has offered to this Court states that he did not think it was necessary or obligatory upon him to give notice to Mathura Prasad Singh. Strictly speaking in point of law he is right; but in fairness Mathura should

have been given an opportunity of being heard, just in the same way as Kunj Behari was, to endeavour to free himself from the taint of the commission of a very serious crime. Accordingly we will affirm the order, dated 20th March 1919, made by the Certificate Officer directing the prosecution of Kunj Behari Singh for offences under Ss. 465 and 471, I. P. C. As against Mathura Prasad Singh we will direct that the order directing his prosecution be set aside, until notice requiring him to show cause why he should not be prosecuted has been served on him and he has had an opportunity of being heard. Therefore we will allow the petition in Mathura Prasad Singh's case; but we will dismiss the petition in Kunj Behari Singh's case, viz. Petition No. 9. The Assistant Government Advocate applies for costs, which application is refused.

V.S./R.K.

Order accordingly.

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JWALA PRASAD, J.

Bachan Ram—Petitioner.

v.

Mohit Ahir—Opposite Party.

Criminal Revn. No. 8 of 1918, Decided on 7th June 1918, against order of Dist. Judge, Muzaffarpore, D/- 15th March 1918.

(a) Criminal P. C. (1898), S. 195—No sanction to be granted unless foundation for charge is on record itself.

No sanction should be granted under S. 195 unless upon the record itself there is a foundation for the charges made. [P 218 C 1]

(b) Criminal P. C. (1898), S. 195—Court in granting sanction should be satisfied that there shall be no abuse of administration of criminal justice.

In granting sanction under S. 195 the Court should be satisfied that there shall be no abuse of the administration of criminal justice. No one should be permitted to use the penal law merely to satisfy his own private ends or personal spite. [P 218 C 2]

(c) Criminal P. C. (1898), S. 195—Lower Court using discretion in not granting sanction—Appellate Court should not grant unless satisfied of reasonable *prima facie* case fit to be tried—It must give reasons for differing with lower Court.

Where a lower Court has exercised the discretion vested in it under S. 195 with great care and

caution and has refused sanction to prosecute, an appellate Court should not lightly dispose of the matter and grant the sanction. [P 217 C 1]

In such a case it is essential that the appellate Court should be satisfied that there is a reasonable *prima facie* case fit to be tried and that there is a reasonable chance of securing a conviction and should give reasons for differing from the view of the lower Court. [P 217 C 1]

P. R. Das and Haresh Chandra Sinha for Petitioner.

Judgment.—This is an application against the order, dated 15th March 1918, passed by the District Judge of Muzaffarpore, in supersession of the order, dated 12th November 1917, of the Munsif of Champaran, who had refused to grant sanction. The order of the Judge granting sanction was passed under Cl. 6, S. 195, Criminal P. C. The sanction for prosecution given by the District Judge arises out of a rent suit No. 999 of 1917 brought by the petitioner in the Court of the Munsif of Motihari against Mohit Ahir, the opposite party, on 28th May 1917. On 4th August 1917, Mohit Ahir applied to the Munsif praying for sanction for the prosecution of the petitioner under S. 209, I. P. C., alleging that the petitioner had claimed rent for the years 1321 to 1324, whereas he had already obtained a rent decree in respect of the years 1321 to 1322 in a previous suit No. 519 of 1915, and had already released the decretal amount, and hence the claim for 1321 to 1322 in the suit of 1917 was false and with intent to injure the opposite party. The petitioner's contention was that the claim for 1321 and 1322 was included in the rent suit in question by mistake and that when the mistake was discovered, the petitioner on 9th July 1917 filed an application for amending the plaint and that the plaint was accordingly amended by the order of the Munsif of the same date and the suit was decreed only in respect of rent for the remaining years. The Munsif upheld the contention of the petitioner and dismissed the application of the opposite party and refused to grant sanction, giving the following reasons for his order :

(1) There is no evidence whether the decree money for 1321 and 1322 was withdrawn by Bachan Ram before or after the institution of Rent Suit No. 999 of 1917. (2) Naga Lal has proved that he got the plaint of Rent Suit No. 999 of 1917 prepared by reference to an account given to him by Hazari Lal, the former

patwari of the opposite party. (3) The verification of the plaint of Rent Suit No. 999 of 1917 clearly states that Bachan Ram himself had no personal knowledge of all the facts mentioned in the plaint and that he knew personally only the contents of para. 1 of the plaint, which relates to his title in the village as *zarpeshgidar*. He clearly states in the verification that all other things are mentioned in the plaint on information. This means that he had no personal knowledge of the other facts mentioned in the plaint, namely, that there was a claim for the years 1321 and 1322. (4) That he amended the plaint when he discovered the mistake, which goes to show that the mistake was a *bona fide* one and that there was no dishonest intention on his part. (5) That Babu Narain Prasad, a Police Officer, is not favourably disposed to Bachan Ram and that he had reported against him to the Sub-Divisional Officer of Bettiah, but the Sub-Deputy Collector on inquiry differed from the report of Babu Narain Prasad, and submitted a report in favour of Bachan Ram and that it was admitted by Mohit Ahir, the opposite party, that Narain Prasad was making *pairvi* on his behalf in this proceeding against Bachan Ram. (6) That there was no finding of the Court in Suit No. 999 of 1917 that claim for 1321 and 1322 was brought with dishonest intention. (7) That the petitioner had failed to make out a *prima facie* case and that there is not sufficient evidence and reasonable probability of conviction of the opposite party under S. 209, I. P. C. for it is quite probable that at the time when Bachan Ram signed the plaint he did not personally know whether rent for 1321 and 1322 was really due or not. The learned District Judge did not dispose of the aforesaid reasons given by the Munsif and declined to enter into them, saying that he was not

"called upon to come to any definite findings as to whether Bachan Ram verified the plaint in the rent suit with guilty knowledge," adding,

"but taking the evidence as a whole, it appears to me probable that Bachan Ram knew very well what he was doing and that his intention was to injure Mohit Ahir."

I do not think that the discretion vested in the Judge under Cl. 6, S. 195 has been properly exercised. The Munsif held a detailed inquiry into the matter, examined the witnesses on behalf

of the parties, and after due consideration came to the conclusion that there was no *prima facie* case made out against the petitioner and no evidence that the claim was made with dishonest intention. But on the other hand the claim was inserted in the plaint on account of a bona fide mistake which, when discovered, was withdrawn. The Munsif complied with the principles settled by judicial decisions that the discretion vested in the Court under S. 195, Criminal P. C., should be used with great care and caution. The authorities are too numerous to be quoted. The following may however be referred to: *Queen v. Poosa Ram* (1), *Kali Charn v. Basudeo* (2). Within the principle enunciated by Sir Lawrence Jenkins, C. J., in *An Attorney, In re* (3), it would be wrong to impose any fetter on the exercise of the discretion of the Munsif, and certainly the District Judge as an appellate Court should not have so lightly disposed of the matter and granted sanction when the Munsif, for the reasons given by him, had refused to sanction the prosecution. In *Jhalan Jha v. Buchar Gope* (4) their Lordships, while upholding the above principle, made the following observation:

"In the terms of that section the Deputy Magistrate, who had the witnesses before him and who was in a position to observe their demeanour and to weigh their testimony, upon a careful analysis of the facts and weighing of their statements thought it inexpedient in the ends of justice to grant the sanction. The learned Sessions Judge did not have the same advantage. Upon a small residuum of the case he thought that the sanction may be given for the prosecution of the petitioner."

This applies with equal force to the present case. I think in the circumstances of this case when the Munsif had distinctly withheld sanction, it was essential that the District Judge ought to have been satisfied that there was a reasonable *prima facie* case fit to be tried and that there was a reasonable chance of securing a conviction and ought to have given reasons for differing from the view of the Munsif: *Venkatesa Ayyangar, In re* (5), *Kali Charan v. Basudeo* (2) and *Habibur Rahman v. Munshi Khodabux* (6).

Upon the record of this case it cannot

(1) [1866] 6 W. R. Cr. 11.

(2) [1908] 12 C. W. N. 3.

(3) A. I. R. 1914 Cal. 597=41 Cal. 446=22 I.C. 321.

(4) [1904] 31 Cal. 811.

(5) [1903] 26 Mad. 193.

(6) [1907] 11. C. W. N. 195.

be shown that the claim for 1321 and 1322 F. S. was made fraudulently or dishonestly or with intent to injure the opposite party in terms of S. 209, I. P. C. The petitioner stated in the verification that he had no knowledge personally of the contents of the plaint, except para. 1, relating to his title as *zarpeshgidar*. The plaint consists of two leaves: the first is a printed form leaving blank space for "years in claim", the account, etc., etc. The second is an ordinary cartridge paper; the whole page is blank and at the bottom the area is written in hand, below which is the verification of the plaintiff. The verification is dated 20th December 1916, whereas the plaint was filed six months after, on 21st May 1917. The blanks in the form on the first page is (sic) filled in with a different ink from that on the second, which contains the area only. Number (sic) of plaints were filed against tenants, which were analogously tried, and the years in claim are variously stated in the different plaints. This fits in with the petitioner's case that his *patwari*, Naga Lal, got the plaint of the rent suit prepared by reference to an account given to him by Hazari Lal Patwari, at the time of filing the plaint, the contents whereof were not within the knowledge of the plaintiff. The Munsif has accepted this evidence. This Hazari Lal Patwari, on the basis of whose account the plaint was filed in, is apparently on the side of the mortgagors who are not on good terms with the plaintiff. Ever since he took the mortgage, the tenants were refractory and he had to bring rent suits. The former *patwari* may have given a false and incorrect account on the basis of which the plaint was prepared. When the plaintiff had already obtained a rent decree in 1915 in respect of 1321 and 1322, it is impossible to suppose, unless the petitioner was demented, that he knowingly again claimed rent for those years in the suit in question of 1917, unless it was due to some mistake, particularly when prior to the institution of the suit the tenants, including the opposite party, Mohit Ahir, had already applied to the Magistrate for an action against him under S. 107 in respect of his general conduct towards the tenants.

This application before the Magistrate was filed on 15th April. The plaint was

filed on 21st May. The report of the police called for by the Magistrate was taken by him on 14th June. On that date the attention of the petitioner was drawn to the claim for the years 1321 and 1322 in the plaint against Mohit, who had received notice of it on 10th June. The petitioner at once on 14th June said that the claim was due to a mistake. On 9th July the date fixed for the case, the petitioner filed a petition for amendment of the plaint on the ground that the claim for the years 1321 and 1322 was included by mistake. The learned Judge thinks that the application was made as the Magistrate directed the Government Pleader on 26th June to defend the rent suits. It appears that the attention of the District Judge was not drawn to the fact that long prior to the report of the police of 22nd June and the deputation of the Government Pleader, the petitioner on 14th June had told the Magistrate that the claim was due to a mistake. There is therefore nothing on the record to show that the inclusion in the plaint of the claim for the years in question was not due to a mistake as alleged by the petitioner and was not due to any dishonest motive. No sanction could be granted unless upon the record itself there was a foundation for the charges made: vide *Jughut Chunder Mozumdar v. Kasi Chandur Mozumdar* (7); *Abdul Khadar v. Meera Saheb* (8) and *Sangli Vira Pandia Chinnatambiar v. Queen* (9).

Another important fact which escaped the notice of both the parties as well as of the Courts below shows the carelessness with which the plaint was prepared and supports the petitioner's case. In the plaint itself there is no claim for rent for the year 1321. In the body of the plaint in the blank space provided for the years, no doubt 1921 to 1924 is mentioned, but in the account of the rent due, given at the foot of p. 1 of the plaint, no rent has been claimed for the year 1321. The account is made in respect of rent for 1322, 1323 and 1324.

This is patent from a perusal of the account itself. The claim is at the rate of Rs. 2-10-3 for three years making a total of 3 into Rs. 2-10-3, i. e., Rupees 7-14-9. Thus p. 1 of the plaint upon which the sanction to prosecute is based

was hurriedly and carelessly prepared with the mistake shown above. There is thus no prima facie case against the petitioner at all and the learned Munsif was supported by evidence in the case when he held that no sanction should be granted. The mistake was corrected and the petitioner has obtained a decree only for what was due. A similar mistake has occurred in the written statement of the opposite party in respect of his allegation that the amount due under the decree of 1915 was deposited by him on 1st November 1914.

It is conceded by the learned vakil on behalf of the opposite party that this date is a mistake for 1st November 1915, corresponding with 28th Kartick 1322; the rent suit itself was brought in 1915 and hence there could be no execution of it in 1914 or a deposit of the amount due thereunder. The Munsif has also held that there is no evidence that the amount deposited by the opposite party in respect of the decree for 1915 was withdrawn by the petition before or after the institution of the suit. This of course is a minor point, for there could be no claim for 1321 and 1322 in 1917 when the decree in respect thereof was obtained in 1915. It may be mentioned that the plea of tender and payment made by the opposite party, Mohit Ahir, in the rent suit was not accepted by the Court, which shows that the opposite party himself also has not come with clean hands.

Lastly there is bitter feeling between the tenants including Mohit Ahir, the opposite party, and the petitioner. The opposite party has not at all been injured by the claim and could not possibly be, when a decree was already obtained and the amount realized for the years in question. The object of the application for sanction was only with a view to wreak vengeance upon the petitioner and to serve private ends by the opposite party, and not in the interest of public justice. The sanction given in this case would be a clear misuse of S. 195, Criminal P. C., and as pointed out by Sir Lawrence Jenkins, C. J., in *An Attorney In re* (3) that

"the Court will be satisfied that there shall be no abuse of the administration of criminal justice, no one would therefore be permitted to use the penal law merely to satisfy his own private ends or personal spite.

(7) [1881] 6 Cal. 440.

(8) [1892] 15 Mad. 224.

(9) [1893] 6 Mad. 29.

For all the aforesaid reasons it is impossible to support the order of the District Judge and to hold that he properly and legally exercised his discretion in setting aside the order of the Munsif refusing to grant sanction. The result is that the order of the District Judge is set aside and sanction is refused.

V.S./R.K. *Order set aside.*

A. I. R. 1919 Patna 219 (1)

CHAPMAN AND ATKINSON, JJ.

Mowar Sheobaksh Singh—Plaintiff—Appellant.

v.

Mowar Thakur Dayal Singh—Defendant—Respondent.

First Appeal No. 57 of 1917, Decided on 22nd March 1918, against order of Sub-Judge, Ranchi, D/- 9th December 1916.

Civil P. C. (1908), O. 41, Rr. 10 (2) and 22 (4)—Appeal dismissed for failure to furnish security for costs—Cross-objections can be heard.

Where an appellant is ordered to furnish security for costs and on his failure to comply with the order his appeal is rejected, the rejection amounts to a dismissal for default, within the meaning of O. 41, R. 22 (4), and the respondent is entitled to have his cross-objections heard and disposed of according to law. [P 219 C 2]

Ram Lal Dutt and Tribhuan Nath Sahay—for Appellant.

Rajendra Prasad and Shambu Saran for Respondent.

Judgment.—This appeal was presented on 26th March 1917. The Registrar directed that the appeal should be admitted and that the usual notices should issue. On 11th June 1917 a cross-objection in the matter of costs was filed. Thereafter the appellant was required to give security for the costs of this appeal. The order relating to the providing of security was passed in the presence of the parties first by the Registrar and then by Jwala Prasad, J. An appeal against the order of Jwala Prasad, J., was dismissed on 19th December 1917. Thereafter on 8th January 1918 we directed that the appellant having been given sufficient time to provide security for the costs of the appeal and having failed to do so within a reasonable time, the appeal should be dismissed with costs. The respondent then moved the Registrar for an order in respect of his cross-objection which he desires to press, and the matter now comes before us. It has been contended that the provision of law

which applies to this case is sub-R. (4) R. 22, O. 41, Civil P. C. That subrule provides that:

"Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."

On behalf of the appellant it is contended that the order directing the dismissal of the appeal was not an order of dismissal for default, and he refers us to the rule which deals with the matter requiring security for costs from an appellant where it is laid down that upon failure to provide security for costs of appeal the appeal shall be rejected. The learned vakil for the appellant contends that in the present case the appeal was rejected and not dismissed for default; and that therefore sub-R. (4) to which I have referred above does not apply. We are of opinion however that the word "reject" is used in the rule dealing with the providing of security for costs because that rule enables the Court to reject an appeal on its presentation on failure to give security for costs and before the respondent appears. We are of opinion that in a case such as the present where the respondent has appeared and where the parties have entered into contest on several occasions before the Court and the appeal is dismissed upon failure on the part of the appellant to provide security that such a dismissal is a dismissal for default. In these circumstances we are of opinion that sub-R. (4) is applicable and that the respondent is entitled to have his cross-objections disposed of in a proper way. As the cross-objection relates only to the question of costs we hold that it will not be necessary to prepare a paper-book. We direct therefore that the cross-objection be brought to a hearing.

V.S./R.K. *Order accordingly.*

A. I. R. 1919 Patna 219 (2)

ATKINSON AND MANUK, JJ.

Mt. Dhunmun Misra and others—Defendants—Appellants.

v.

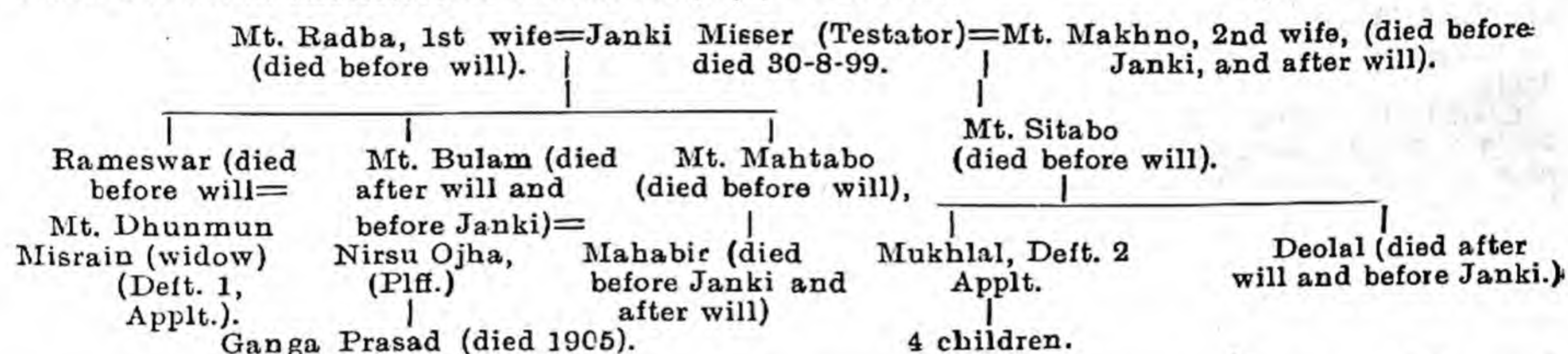
Nirsu Ojha—Plaintiff—Respondent.

Appeals Nos. 850 and 1146 of 1917, Decided on 10th January 1919 from decision of Dist. Judge, Patna.

(a) **Hindu Law—Will—Construction—Testator providing that his widow and predeceased son's widow should remain in possession and that after death of widows his grandsons should become permanent maliks—His wife predeceasing him—Predeceased son's widow took widow's interest—Grandson received vested interest.**

In a will made by a Hindu it was provided that after the testator's death his widow and the widow of his predeceased son should remain in possession of his properties without power of alienation, and that they should maintain themselves and the testator's grandsons out of the income of the estate. It was further provided that after the death of the widows the grandsons of the testator should become permanent maliks of the estate, generation after generation. The testator's widow predeceased him:

Held: (1) that the widow of the testator's predeceased son received under the will a Hindu widow's estate as understood in Hindu law; (2)



By his will, dated 8th December 1893 Janki Misser, after setting out the names of his immediate relations as shown in the genealogical table, made the two following provisions for the disposition of his property after his death :

"After my death Mt. Mukhno Misrain, my first wife and Mt. Dhunmun Misrain, widow of my son Rameswar Misir, shall both of them, or any of them who will be then alive, jointly remain in possession of my properties; they have power, as long as they live, to maintain themselves and my grandsons whose names have been mentioned above from the produce and income of my properties. The said Musammats will not have the power of transfer, etc. If my wife dies then the widow of Rameswar Misir, my son, will obtain possession, and if the widow of Rameswar Misir dies then my wife will obtain possession over all my properties moveable and immovable, and if both the Musammats die one after another, then in that case the sons of my three daughters will become permanent Maliks with possession, to the extent of one-third each, of all my moveable and immovable properties; that is to say, the sons of Mt. Bulam to the extent of one-third, the sons of Mt. Mahtabo to the extent of one third and the sons of Mt. Sitabo to the extent of one-third. My grandsons whose names have been mentioned above, or who may be born afterwards (will be maliks) generation after generation. Nobody will have any objection to it. Therefore I have executed this will so that it may be of use when required."

On his death Mt. Dunmoon entered

that the grandsons of the testator received vested interests in the estate of the testator.

[P 222 C 2, 223 C 1]

(b) **Hindu Law—Alienation—Widow—Necessity—Actual pressure and benefit conferred must be considered.**

In considering the question of necessity for an alienation made by a Hindu widow the actual pressure on the estate, the benefit to be conferred upon it and the immediate needs of those to be maintained from it should be taken into account.

[P 224 C 1]

Kulwant Sahai—for Appellants.

Panchanan Banerjee—for Respdt.

Manuk, J.—The facts out of which this second appeal arises can best be stated by setting out the genealogical table showing the relations of the parties concerned as found by both the lower Courts.

into possession of the whole of his properties in accordance with the terms of this will, and previous to the institution of the plaintiff's suit the following transfers of the property had been effected :

(1) 2nd November 1901, an ijara executed by Mt. Dunmoon to Abalik Ram, husband of defendant 3, for a zarpushgi of Rs. 1,000. Of this sum Rs. 800 went to pay off completely a previous mortgage executed by Janki himself, the balance of Rs. 200 being retained, as the document shows, towards the lady's domestic expenses. This ijara deed was signed on behalf of the Musammats per pen of Nirsu Ojha, the present plaintiff. (2) 27th October 1911, a mortgage deed executed by Mt. Dunmoon for Rs. 500 in favour of one Biku Mani, defendant 5. This deed recites that the declarant was in need of money to defray the expenses of a suit brought by Nirsu Ojha, the plaintiff, to pay off miscellaneous debts and for her household expenses. (3) 25th November 1914, a deed of sale executed by Mt. Dunmoon and Mukhlal, defendant 2, conjointly whereby they conveyed certain properties left by Janki to one Jamuna Kuer, defendant 3, for a sum of Rs. 1,825. A threefold necessity

for the sale is recited in the document : (a) to discharge then outstanding balance of Rs. 1,000 due on the ijara of 2nd November 1901 ; (b) to pay up Rs. 250 principal and Rs. 275 interest due on two hand-notes executed by Mt. Dunmoon per pen of the plaintiff Nirsu on 13th June 1908, and 3rd January 1906 respectively, and (c) the balance of Rs. 300 of the consideration money to defray the expenses of a civil and criminal case then pending between Mt. Dunmoon and the plaintiff. (4) 10th December 1914, a mortgage executed by Mt. Dunmoon and Mukhlal, defendant 2, conjointly in favour of one Kailash Misser, defendant 4, and Biku Mia, defendant 5, for Rs. 1,100, in order to pay off the debt of one Raghunandan Singh borrowed under bahi khata account, but how, when or why, the document does not set out.

The plaintiff instituted his suit in June 1915 against Mt. Dunmoon, Mukhlal and the decree transferees, defendants 3 to 5, to have it declared on the construction of the will that the four documents set out above were null and void, and inoperative as against him. He offered however to repay any sum that may be found by the Court to have been "appropriated to the repayment of legal debts due by Janki Missir" and to be still due to defendants 3 to 5 on the ijara or the deed of sale, if such repayment was held by the Court to be a condition precedent to the deeds being set aside. The plaintiff claims that his son Ganga Prasad had under the will a vested interest in his own share of Janki's estate and that when Ganga died, he, the plaintiff, as father and heir of his son, had a like vested interest in his son's share.

The suit was contested by all the defendants on various grounds, but after the finding of facts arrived at by the lower Courts two questions of law first emerge for our consideration : (1) whether Ganga Prasad had a vested or merely contingent interest in Janki's estate ; and (2) whether Mt. Dunmoon received under the will a mere life-estate in the sense which the term connotes in English law, or a Hindu widow or woman's estate as understood in Hindu law.

On the first question both the lower Courts have held that Ganga Prasad received a vested interest under the will and that therefore on Ganga's death his father, the plaintiff, succeeded to that

interest. We are of opinion that the lower Courts were right in so holding. Para. 2 of the disposing portion of the will is set out above and clearly creates a charge or trust on the life-estate for the immediate benefit and maintenance of the testator's grandsons named in the earlier portion of the will, one of whom was Ganga Prasad. Moreover, in para. 3 of the will the testator clearly sets out his intention that on the death of both the life-tenants his three grandsons should take the remainder in equal one-third shares and be maliks (generation after generation). The learned vakil for the appellants relies on the words :

"and if both the Musammats died one after another then in that case the sons of his three daughters will become permanent Maliks with possession",

and argues that these words clearly indicate a merely contingent interest. This argument, in my opinion, fails to give due weight to the previous provisions for the immediate maintenance of these grandsons during the lifetime of the Musammats and also overlooks the full significance due to the words "maliks with possession" in this very passage. The whole scope and scheme of the will indicate clearly to my mind that the object of the testator was to make special provision for the grandsons, subject to the two life estates, to give them a vested interest in his estate, which would fructify into full possession on the death of the life-tenants. Were it otherwise, it is difficult to see how the testator's wish as expressed in para. 3, that the grandsons will be maliks generation after generation could be fulfilled with any security. The best test of his intentions is to be found in the answer to the following hypothetical case: Suppose Ganga Prasad had lived long enough to marry and have children but not long enough to survive the two life-tenants, could it have been the intention of the testator that Ganga Prasad's sons should have no share in his estate? This would be in direct antagonism to his expressed wishes that his grandsons should be Maliks generation after generation; yet such children of Ganga Prasad would have been cut off from inheritance on the construction of the will contended for by the appellants. The learned vakil relies on the fact that this paragraph of the will also provides for unborn grand-

sons. This however would not affect the status of each branch or the character of its interest but only the precise share which the grandsons of each branch would take, i. e., the devolution would take effect per stirpes and not per capita. There is ample authority in England for the construction we place upon the terms of this will.

In the case of a devise after the death of the tenant for life, in trust to sell, and "pay and divide" the produce amongst all the children, to be paid as and when they respectively attained twenty-one, and in the meantime the interest be applied to their maintenance, with a gift over, in case the tenant for life died without leaving any child, it was held that the interest of the children vested at their births: *Shrimpton v. Shrimpton* (1). The Master of the Rolls in delivering judgment in that case pointed out that there was a clear distinction between the gift and the time of payment and that the postponement of the payment does not postpone the vesting. The provision for maintenance till the time for payment was also considered an important factor in the construction of the will. In *Leadbeater v. Cross* (2) Lush, J., in pronouncing the judgment of the Court in a similar case pointed out that the terms of the will if literally construed, make a happening of the event, namely, the survivorship of the tenants for life, a condition precedent to the gift, but the Court was to look not at the form but at the substance of the devise in order to find the intentions of the testator and to carry out those intentions, unless there is something in the language which obliges the Court to hold that that intention cannot be carried into effect. "Variations of expression," said the learned Judge:

"are not to be regarded as substantial distinctions and where the intention of the will is plain and no rigid rule of law prevents effect being given to it, our duty is so to construe it as to carry out their intent."

Again in *In re Betty Smith's Trusts* (3), where there was a gift of personalty by will, after the death of J. (to whom an annuity was given out of the fund), to E during her natural life, but in case of the death of E during the lifetime of J then to M for life, and after the decease

of both E and M then over, it was held that there was sufficient indication of the testator's intention to give a life-estate to M after the death of E., although E did not die in the lifetime of J: see also *Bainbridge v. Cream* (4). The provisions of the Succession Act, Ss. 106 and 107, in my opinion, in no wise affect the rules of construction as laid down in the above cases and taking the will as a whole I have no hesitation in holding that Ganga Prasad received a vested interest and that the plaintiff as his father has inherited that interest. The learned District Judge was therefore perfectly correct in holding that

"the interest of the grandsons vested on the death of the testator, though the enjoyment was postponed until the intervening life-estates terminated."

On the second question the first Court apparently held that Mt. Dunmoon received under the will what is ordinarily known as a Hindu woman's estate and that Court therefore entered into the question of legal necessity for the execution of the impeached documents. The lower appellate Court however was of opinion that Mt. Dunmoon did not take the estate of a Hindu widow but a mere life-estate with no power of alienation at all. The learned District Judge therefore held that her alienations would be limited to her own life. The question to my mind however seems to be concluded by the Full Bench decision in *Ram Bahadur v. Jagernath Prasad* (5). The will in that case provided that after the testator's death certain of his properties

"will remain in the possession of his wife during her lifetime, she having no power to transfer them,"

and that after paying the Government revenue, etc., she would "bring the remainder to her own necessary expenses." There was a further bequest in precisely the same terms in favour of his deceased brother's daughter after the death of his wife. After an exhaustive review of all the authorities, the Full Bench held that the estate devised to the niece was an estate such as women only acquired by inheritance under Hindu law, which she held in a completely representative character but was unable to alienate except in case of legal necessity. The Court further observed that the words "without the power of alienation" are not more indi-

(1) [1862] 31 Beav. 425.

(2) [1876] 2 Q. B. D. 18.

(3) [1865] 1 Eq. 79.

(4) [1852] 51 E. R. 685.

(5) [1918] 3 Pat. L. J. 199=45 I. C. 749 (F. B.)

cative of an estate for life in the English sense than of a widow's or woman's estate. I can find nothing in the terms of the present will to distinguish it from the will in that case, and I must therefore hold that Mt. Dunmoon received an ordinary Hindu widow's estate under the will of Janki. This being so, it becomes necessary to consider which, if any, of the impugned debts were incurred for legal necessity. The learned Subordinate Judge held that the Rs. 800 borrowed on the ijara of 2nd November 1901, in order to pay off an earlier mortgage executed by Janki himself, was for legal necessity, and I apprehend that there can be no two questions of the accuracy of this finding. The only other item he allowed was that of Rs. 525 taken out of the consideration money for the deed of sale of 25th November 1914 in order to pay up the two hand notes referred to above. His only reason for allowing this item apparently was that the plaintiff looked after the affairs of Mt. Dunmoon after Janki's death and this sum was borrowed at his instance. The learned District Judge, although he held that no question of legal necessity arose, seems to have considered some of the items on the cross-appeal by the present plaintiff on this point. He rightly held that the sum of Rs. 800 was plainly borrowed for the benefit of the estate. He seems to have disallowed the Rs. 525 borrowed on the hand notes on the ground that the hand notes show that the debts were incurred for family expenses. He also disallowed all debts incurred on account of law cases because there was no proof that the cases related to the estates of the testator. Another item Rs. 200 does not appear to have been considered.

We felt pressed by the arguments of Mr. Kulwant Sahay that the learned District Judge had not considered these items from the appellants' point of view, inasmuch as he had already found that Mt. Dunmoon did not take a Hindu woman's estate and so no question of legal necessity arose. Rather than remand the case on this one small question of mixed law and fact and put the parties to unnecessary expense and the lower Court to the trouble of refreshing its memory on the whole case, we decided to enter into the evidence ourselves and terminate the litigation here.

We have heard all the relative evidence

on this point read out to us by the learned vakil for the appellants, and it is quite unnecessary to enter into details of that evidence. The Musammat herself in speaking of the various necessities arising for each of these loans, is contradicted by her own declarations in the documents. She endeavours to establish necessities which the documents are silent about. As to the hand-notes she does not remember for what purpose she borrowed this money. The witness Raghunandan Singh, to pay whose debt the mortgage of 10th December 1914 was ostensibly executed has also failed the defendants absolutely on this point; he is unable to give any information on which the Court could possibly gather that this debt had been contracted for legal necessity so as to enable the mortgagees, defendants 4 and 5, to bind the property. Defendant 5 Biku Mian, who is interested in the documents of 27th October 1911 and 10th December 1914, has also been unable to carry the case of legal necessity any further. He admits he cannot say for what purposes Raghunandan's debt was contracted by the Musammat, but some one called Bachu, and Raghunandan himself said there was no objection. From Raghunandan's point of view there certainly would be no objection. With regard to the Rs. 500 on the earlier mortgage he does not know for which case the money was borrowed and did not see any papers relating to the case; nor did he make any inquiries about the expenses of the family.

Mr. Kulwant Sahay has particularly pressed us to allow the Rs. 525 borrowed on the two hand-notes Rs. 250 as principal and Rs. 275 as interest, which sum was paid off by part of the proceeds of the deed of sale of 25th November 1914 in favour of defendant 3's servant. Heman Ram is much too vague and in no wise helps one to arrive at a decision in favour of the defendants. He has no personal knowledge of the hand notes having been in fact paid up; moreover he made no inquiries about the character of the Musammat's interest in the estate and did not know there was a will under which she held the property. No account books are produced. There remains one item of Rs. 200, the balance of the money borrowed on the ijara of 2nd November 1901 (after paying Rs. 800 towards a previous debt incurred by

Janki Misser himself) which remained in the hands of the Musammatt. With regard to this sum of Rs. 200 we think we would be justified in passing it as borrowed for legal necessity. In the deed the recital with regard to this sum shows that it was retained for domestic expenses. On the evidence quite apart from the recital in the document itself there is plenty of material for us to conclude that the lady was at that time in need of money for various necessary purposes and that the sum of Rs. 200 which was borrowed on this document was not too large a sum to meet the necessities which she was then labouring under. It is fair to presume that her husband who left a considerable debt to pay did not leave any cash funds with her, and therefore while she had to pay the debt, she must also have had to continue to maintain herself and to maintain her grandsons according to her father-in-law's behest as directed in the will. In order to do so she had at best an income of Rs. 600 a year from the family property, an income which would only be paid to her in small instalments according as the rents were realized from the tenants. She must have also had the expenses of various ceremonies to meet at the time, and with these young children dependent on her, we are of opinion that she was perfectly justified in borrowing sufficient money to maintain and support and, if necessary, educate them. We therefore have no hesitation in passing the sum of Rs. 200 as money borrowed for good legal necessity.

The Privy Council have laid down the general principle that the actual pressure on the estate, the benefit to be conferred upon it and the immediate necessity of those to be maintained from it are the things to be considered. On this principle we pass this sum of Rs. 200. We therefore direct in variation of the decree given by the learned District Judge that, on the plaintiff depositing in Court the sum of Rs. 1,000 on or before 1st March, the documents he impeaches will be set aside in the terms of his first prayer. In default of payment by the 1st March the plaintiff's suit in respect of the ijara deed of 2nd November 1901 will be dismissed and the property left by Janki Misser will stand charged in favour of defendant 3 for the payment of Rs. 1,000 as originally secured by that document. To avoid further litigation we direct that

defendant 3 shall be entitled to withdraw this sum, inasmuch as it was from the proceeds of the deed of sale of 25th November 1914 in her favour that the balance of Rs. 1,000 then due on the ijara deed was liquidated.

The appeal of the defendants subject to this modification is dismissed, but having regard to all the circumstances we make no order as to costs in this Court. With regard to Cross-appeal No. 1146, it as been pointed out to us that the learned District Judge has in his judgment held that, on the death of Janki Misser, Ganga Prasad took a vested interest in 1/3rd share of his grandfather's estate. It is urged that this is incorrect inasmuch as at that time the only other grandson living was Mukhlal; and if this is so, Ganga took a half-share instead of a 1/3rd share. This question however was really not before the Courts in this litigation and we desire to make it quite clear that the share which Ganga Prasad took is left open for future determination if necessary.

Atkinson, J.—I concur.

V.S./R.K.

Decree modified.

A. I. R. 1919 Patna 224

DAS AND ADAMI, JJ.

Qamruddin and others—Appellants.

v.

Fakhruddin and others—Plaintiff—Respondents.

Second Appeal No. 519 of 1918, Decided on 23rd May 1919, from decision of Offg. Dist. Judge, Darbhanga.

Mahomedan Law—Alienation—Guardian—Alienation by mother of minor's property is invalid.

A Mahomedan mother is not the guardian of her minor daughter, either de jure or de facto, and has no authority, either express or qualified, to convey property belonging to her minor daughter in favour of any person. [P 225 C 1]

Fakhruddin—for Appellants.

Hasan Jan—for Respondents.

Das, J.—This appeal comes before us from the judgment of the Officiating District Judge of Darbhanga and arises out of a suit instituted by Shaikh Fakhruddin, who is one of the respondents before us, against the appellants for declaration of his title to and for recovery of certain properties which are specified in the plaint. It appears that one Jadibuksh died leaving two sons, three daughters and a widow. Upon his death the widow and her infant daughter became entitled

to a two-anna share each. The widow on her own behalf and as guardian of her minor daughter conveyed a four-anna interest in the property to the plaintiff, and it is on the basis of this conveyance that the plaintiff brought the action out of which this appeal has arisen.

Various questions were raised in the Courts below and were disposed of in favour of the purchaser; but before us the substantial question that has been argued on behalf of defendants 1 and 2, who are the sons of Jalibuksh and are in possession of the property, is that the widow was not competent to convey the share which belonged to her infant daughter. Upon this question the lower appellate Court came to the conclusion that a sale by the mother is neither void nor voidable, but in a state of suspense till the end of the minority of the minor. No doubt, at the time when the learned Judge decided this case it was possible to take this view, but in our opinion the argument is admissible in view of the latest Privy Council decision. The Privy Council in *Imambandi v. Mutsaddi* (1) has reviewed all the authorities and has come to the conclusion that a Mahomedan mother is not the guardian of her minor daughter either de jure or de facto and has no authority, either express or qualified, to convey the property belonging to her minor daughter in favour of any person. In our opinion, that decision is destructive of the case put forward on behalf of the purchaser. The lower appellate Court has come to the conclusion that there was no necessity for the sale of the minor's property. Therefore transaction is absolutely void and passed no title whatever to the purchaser. There being no title in the purchaser so far as the infant's share is concerned, he was not able in an action in ejectment to maintain a suit as against defendants 1 and 2. In our view therefore the decision of the lower appellate Court on this point is erroneous. The decree of the lower appellate Court, in so far as it awards to the plaintiff possession of the share of the infant daughter, should be discharged. We would therefore allow this appeal.

The result is that the plaintiff's suit, in so far as it relates to the 2-anna share which belonged to the infant daughter,

will stand dismissed. The appellant is entitled to the costs of this appeal.

Adami, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 225

DAS, J.

Dhakeshwar Prasad Narain Singh and others—Plaintiffs—Appellants.

v.

Manna Lal and others—Defendants—Respondents.

Appeal No. 1200 of 1917, Decided on 22nd May 1919, from appellate decree of Dist. Judge, Patna.

Tort—Vicarious liability—To hold master liable for tort committed by his servants it must be proved that act was done in course of something authorised by master.

Before a plaintiff can succeed in a suit for damages against a master for a wrong done by his tenants and servants, he must show that the act complained of was done in the course of something which was authorised by the master to be done [P 226 C 1]

Ganesh Datt Singh and Gangadhar Das—for Appellants.

Kulwant Sahai and Nowal Keshore Prasad—for Respondents.

Judgment.—The plaintiffs are the Maliks of Mouza Ghazipur and they instituted the suit out of which this appeal arises for recovery of Rs. 440-15-0. Their case is that the bund which they had erected in the Nigar for the irrigation of their lands was cut by the Amlas and tenants of the defendants with the result that the crops were materially damaged. The suit therefore was a suit for damages against the masters for a wrong done by the tenants and servants of the master. The lower appellate Court has given a decree for the full amount.

The lower appellate Court has found, firstly, that the plaintiffs were entitled to erect a dam in the Nigar and that the bund was actually cut by the Amlas and the tenants of the defendants, secondly by reason of this tort committed by the Amlas and tenants of the defendants, the plaintiffs have suffered damages which the lower appellate Court has assessed at Rs. 440-15-0. These findings are findings of fact and are therefore binding on me in second appeal. But the question of law which has been argued by Mr. Ganesh Datt Singh is that the masters would not be liable for the tort committed by the servants unless it is shown that the tort in question was committed within the scope of their employment. He says

(1) A. I. R. 1918 P.C. 11=45 Cal. 878=45 I.A. 73=47 I. C. 513 (P. C.),

that there is no evidence and no finding that it was part of the duty of the Amlas to look after the irrigation work on behalf of the Maliks, and therefore in the absence of such a finding the Maliks would not be liable in an action for damages. There is one matter that must be disposed of at once. The lower appellate Court undoubtedly says in the course of his judgment that

"it was the duty of the Amlas to look after the irrigation of the village and the interest of the proprietor generally."

It has been argued on behalf of the respondent that the lower appellate Court intended to find this as a fact on the evidence that was adduced in the case. Mr. Ross, the learned District Judge, is always very precise and clear in his language, and reading the judgment as a whole I do not think that he intended to find it as a fact that the

"duty of these Amlas in question was to look after the irrigation of the village and the interest of the proprietor generally."

He assumed, I think, that it was the duty of the Amlas to look after the irrigation of the village and the interest of the proprietor generally, and I am confirmed in this opinion by the words "and the interest of the proprietor generally" that occur in the judgment. No doubt it is the duty of the Amlas to look after the interest of the proprietor generally, but the question still remains whether it was part of their duty to look after the irrigation of the village. That must depend upon the evidence before the Court. I do not think that Mr. Ross intended to find as a fact on the evidence that was produced before him that it was part of the duty of the Amlas who actually committed the tort to look after the irrigation of the village. The question therefore that arises in this case is whether, in the absence of a finding that part of the usual work of the Amlas who actually committed the tort to look after the irrigation work, there can be a decree against the Maliks. It is conceded that before a decree can be passed against the Maliks, it must be shown that the tort committed by the servants was within what is usually termed the scope of their employment. But it is argued that since the Amlas were in the service of the Maliks therefore it was within the scope of their employment to do work on behalf of the Maliks. In the well-known work on torts by Clerk and

Lindsell, Edn. 6, p. 82, the learned authors says :

"An act is said to be within the scope of the servant's employment when, although itself unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do that it may be said to be a mode, though no doubt an improper mode of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorized the master will be responsible but not for an act wholly unconnected with the class of acts which the servant was authorized to do. In short, the master's liability for the unauthorized torts of his servant is limited to unauthorized modes of doing authorized acts."

Therefore before the plaintiffs can make the Maliks liable for the tort committed by the Amlas, it must be shown that the act that was done in the course of doing something which was authorized. In the leading case of *Barwick v. English Joint Stock Bank* (1) Willes, J., with reference to what may be deemed to be in the course of service, said as follows :

"In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

Therefore according to Willes, J., the test is, has the master put the agent in his place to do that class of acts in other words did the Maliks in this case put the Amlas to do irrigation work on their behalf? That seems to me to be the real test in cases of this kind. The view that I take is in complete accord with the decision in *A. Caspersz v. Kishori Lal Roy Chowdhari* (2). The question in that case was whether the master was liable for damages for the wrongful felling and carrying away of trees growing on part of the estate belonging to the plaintiff. The Judicial Committee in the course of their judgment says :

"Several of the questions raised here may be disposed of very shortly. Both Courts have held that it is not proved that any cutting took place by actual order of the first two defendants. Mr. Arathoon was given to contend that they must be held responsible for it in point of law, because the other defendants held some employments under them. But there is no evidence at all that to cut trees was in the ordinary course of the duty of any of them. The only statement to which their Lordships were referred bears the

(1) [1867] 2 Ex. 259.

(2) [1896] 23 Cal. 922=7 Sar. 31 (P. C.).

other way. The appeal wholly fails as against the first two defendants."

I am of opinion that it was essential that the plaintiffs should prove that it was part of the duty of the Amlas who actually committed the tort to do that class of work in connexion with which the bund was cut by them. There is no finding to that effect. It may be that there is evidence on the record which would enable the lower appellate Court to come to that conclusion. I would, therefore allow this appeal and remand the case to the lower appellate Court for a finding on this issue. The lower appellate Court will consider the evidence and dispose of the following issue :

Was it part of the duty of the Amlas who actually committed the tort in question to do that class of work in connexion with which the bund was actually cut by them ?

I reserve the question of costs.

Let the record be returned to the lower appellate Court forthwith. The lower appellate Court will return its finding on the issue framed by me to this Court with all convenient speed.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 227

DAWSON-MILLER, C. J. AND ADAMI, J.

Uchit Mandar and others—Appellants.

v.

Gosain Singh Baid and others—Respondents.

Letters Patent Appeal No. 108 of 1917, Decided on 16th June 1919, from judgment of Mullick, J., D/- 18th May 1917, reported in 41 I. C. 55.

Transfer of Property Act (1882), Ss. 68 and 58—Usufructuary mortgage entitling mortgagee in case of dispossession, to damages or to interest at stipulated rate—Mortgagee dispossessed from half portion—After 12 years suit for principal and interest at stipulated rate for period of dispossession—Mortgagee held estopped from claiming interest.

A usufructuary mortgage stipulated that, in the event of dispossession of the mortgagee he would be entitled to damages or to interest at a specified rate. In 1898 the mortgagee entered into possession, but in April 1902 he was dispossessed of half the property. Later on, the mortgagor sold the equity of redemption in the remaining half, and in April 1915 the purchaser forcibly dispossessed the mortgagee therefrom. In May 1915 the mortgagee brought the present suit to recover the principal sum advanced, together with interest at the stipulated rate on half that sum for the period between April 1902 and April 1915:

Held: that the plaintiff having been dispossessed for 12 years and not having done anything during that time either to obtain compensation

from the mortgagor or to realise from the mortgagor or from the property his mortgage-debt, or to claim additional security, or to enforce payment of interest, must be deemed to have acquiesced in the changed state of affairs and was consequently estopped from claiming interest.

[P 229 C 1, 2]

*Shoroshi Charan Mitter—*for Appellants.

*Rajendra Prasad—*for Respondents.

Dawson-Miller, C. J.—This is an appeal by the plaintiffs under Cl. 10, Letters Patent, from a judgment of Mullick, J., dated 18th May, 1917, affirming a decree of the Subordinate Judge. In July 1918 the plaintiffs' predecessors-in-title took a usufructuary mortgage from the father of the defendants first party of the occupancy rights in a holding belonging to the mortgagor to secure an advance of a sum of Rs. 498. The mortgage stipulated for repayment in the following year, failing which the mortgagee was to remain in possession until the principal sum and interest at 2 per cent. per mensem should be paid off. The mortgagee entered into possession, but he was dispossessed of half the property by the nephew of the mortgagor, who brought a suit claiming half the property as his own and obtained a decree declaring his title and awarding him possession. He is the defendant 3rd party in the present suit. The defendant 2nd party subsequently purchased the equity of redemption of the mortgagor in the remaining half which had remained in possession of the plaintiffs, and on 4th April 1915 forcibly dispossessed the plaintiffs. In May 1915 the plaintiffs instituted the present suit to recover the principal sum advanced namely, Rs. 498, together with interest at 2 per cent. per mensem on half that sum between April 1902, when they were dispossessed of half the property and April 1915, when they were dispossessed of the remainder. The interest thus calculated amounts to Rs. 785, but the plaintiffs remitted Rs. 408 of this amount as they say the property is of insufficient value to enable them to realize the whole claim. The claim for interest is therefore reduced to Rs. 377 making with the principal a sum of Rs. 875 as the amount claimed. The mortgage contains the following stipulation:

"If on account of default in payment of rent due to the proprietor or on account of my wrongful act (that is wrongful act of the mortgagor) or for any other reason, the said Mahajan (that is

the mortgagee) be dispossessed of the land, then I shall pay damages on account of dispossession at the rate of 13 maunds of paddy per bigha or I shall pay interest at the rate above mentioned either amicably or by suit."

It is only necessary to state further with regard to the mortgage bond that whilst it is what is known as a usufructuary mortgage whereby the mortgagee is put in possession in order to cultivate the land and appropriate the entire proceeds thereof in lieu of interest, it is also a simple mortgage in that the property mortgaged is charged with the repayment of the principal sum advanced. When this suit was instituted, the principal sum of Rs. 498 was tendered in full satisfaction and paid into Court by the defendants. The only question for determination is as to the right to claim half the interest stipulated in the mortgage during the period when the plaintiffs were out of possession of half the property. The main defence was that the plaintiffs had by their conduct acquiesced in the diminution of the security to the extent of one-half of the original holding and had so waived any rights they might have had under the bond.

The Munsif found in favour of the plaintiffs and decreed them interest as well as the principal sum claimed. On appeal the Subordinate Judge took a different view and found that the mortgagees, having taken no step for over 12 years to call on the mortgagor to recoup him for the loss of half the security, must be presumed to have acquiesced in the loss and to have remained satisfied with the diminished security. When the case came before this Court on appeal, it was contended that the question was one of fact which had been determined by the lower Court and that the facts were not open to review by a Court of second appeal. It is quite true that the question of acquiescence is in a sense a question of fact, but it is only so in so far as it is a question of the proper inference to be drawn from proved or admitted facts. That proposition was considered by their Lordships of the Privy Council in the case of *Beni Ram v. Kundan Lal* (1), where it was laid down that the question of acquiescence is not purely a question of fact but of legal inference from facts found. The learned Judge of this Court accepting that view came to the conclusion that, on the facts found by the Sub-

ordinate Judge, the finding that there had been acquiescence on the part of the plaintiffs which would estop them now from contending that they were entitled to interest had been sufficiently made out and he dismissed the appeal.

A number of cases have been referred to in argument before us dealing not only with the principle just mentioned but with the class of cases in which the Court will hold that the facts have been sufficiently proved to enable it to come to the conclusion that there has been acquiescence in the sense named. The cases of *Beni Ram v. Kundan Lal* (1) was one where a tenant the term of whose lease had expired resisted eviction on the ground that he had, with the knowledge of the lessor, erected permanent buildings on the land leased during the term. He contended that there was an equitable estoppel against the lessor precluding him from denying that the tenancy had been changed into a permanent occupancy. The lease was granted for the purpose of erecting a saltpetre factory. The factory, it appears, had ceased to be worked after a time and shops and other buildings were erected on the land by the tenant. The landlord, although he was aware of what was going on, did nothing. Now it is well established in England that if a tenant builds on land held by him under a lease he does not, apart from special circumstances, acquire any right to prevent the lessor from taking possession of the land and the buildings on the expiry of the term. That doctrine was laid down many years ago in the well-known case of *Ramsden v. Dyson* (2). The only difference in India is that the tenant may remove during the continuance of the lease anything which he has attached to the land provided he leaves the property in the state in which he received it. It is quite clear therefore that in the case quoted there was no estoppel whatever against the lessor, and although the High Court decided that there was, misapplying the principle laid down in an earlier case, their Lordships of the Privy Council pointed out that there were no facts proved in that case from which an estoppel by acquiescence could be inferred.

The next case referred to was that of *Partab Bahadur Singh v. Gajadhar*

(1) [1893] 21 All. 496=26 I. A. 58 (P. C.).

(2) [1866] 1 H. L. 129.

Bakhsh Singh (3). In that case there was a stipulation for payment of interest until delivery of possession. There was no express stipulation for interest in case of dispossession. The mortgagee was dispossessed of about half the villages mortgaged and he took no action to recover the mortgage money for about 30 years but remained satisfied with the diminished security. When he brought a suit claiming interest in respect of that half of the property from which he had been dispossessed, their Lordships of the Privy Council came to the conclusion that as he had taken no steps for so long either to get additional security or to get the rent of the villages which were left with him enhanced, it must be taken that he had acquiesced in his dispossession and had consented to go on with the diminished security as if he had everything that he was entitled to. It is quite true that in that case there was no stipulation for interest in the case of dispossession. But the decision does not seem to have depended upon that fact, and in spite of the absence of such a stipulation it seems pretty clear that had their Lordships come to the conclusion that there had been no acquiescence, they would have awarded interest or something in lieu of interest in the nature of damages to the plaintiff in that suit.

I do not think that this case is absolutely concluded by the decisions which I have referred to. It must in my opinion, be a question of fact in each of these cases whether there was such conduct on the part of the plaintiff that he must be taken to have acquiesced in the changed state of affairs so as to bring into operation the equitable doctrine of estoppel. The learned Subordinate Judge as well as the Judge of this Court came to the conclusion that the facts in this case were sufficient to prove acquiescence and I have arrived at the same conclusion. The reasons which induce me to support the view taken by the lower Court on this question are these: The plaintiffs, having been dispossessed for 12 years before they brought any suit, took no action whatever during that time either to obtain compensation from the mortgagor or to realise from the mortgagor or from the property his mortgage-debt. They did absolutely nothing which would

induce the mortgagor to come to any other conclusion than that they were quite satisfied to go on accepting the diminished security in lieu of the payment of interest. But that alone would not, in my opinion, be sufficient to justify the Court in coming to the conclusion that they meant to forego their rights. There is another element in this case which must not be lost sight of, and that is this: this was a mortgage for a period of about a year or a little over. At the end of that time the mortgagor had the right to redeem the property by paying the amount of the advance, a sum of something under Rs. 500. If he did not choose to do so, then the mortgagees were entitled to remain in possession satisfying themselves out of the proceeds for the interest which the mortgagor had undertaken to pay and accepting those proceeds in lieu of interest. Whether they would amount to more or, whether they would amount to less than 2 per cent. per mensem on the capital sum advanced, was a matter of no materiality.

The mortgagees took the risk of that. They might either get more by cultivating the land and appropriating the proceeds or they might get less. When they were dispossessed in the year 1902, several courses were open to them. Either they could go on accepting in lieu of interest the proceeds in the diminished security or they could demand half the rate of interest or they could apply for further security for the interest. They could also, of course, bring a suit against the mortgagor to realise the amount of the loan and if they succeeded, and it is difficult to see how they could have failed they would be entitled to recover the principal sum and when they had done so, the right to interest would naturally come to an end. But by not taking that course or applying for further security or demanding interest I think that it is clear that they must have induced in the mind of the mortgagor a not unreasonable impression that they were content to go on accepting the diminished security. Had the mortgagor thought that the plaintiffs were not content to accept the diminished security but would, when the mortgage was finally put an end to which might be many years hence, endeavour to recover from him interest in respect of half the property of which he was dispossessed in addition to the proceeds which they would

(3) [1902] 24 All. 521=29 I. A. 148 (P. C.).

in the meantime be getting from that property, it would have been open to the mortgagor at once to pay off the mortgage and so get rid of the whole matter, as in fact he did as soon as the mortgagees brought an action to realize their loan and recover interest. It seems to me that in these circumstances the mortgagees, by their conduct in failing to claim additional security or to enforce payment of interest in lieu of the proceeds of the land from which they were dispossessed or to take any other steps for 12 years, must be taken to have induced the belief in the mind of the mortgagor that they were content to accept the diminished security and therefore that by allowing them to remain in possession instead of by paying the mortgage-debt and redeeming the property he was incurring no risk of having to pay interest when the property should ultimately be redeemed. Therefore, it seems to me that by their conduct the mortgagees did in fact put the mortgagor in a worse position and they ought not now after this lapse of time to be entitled to claim that interest about which they have been silent for so many years. In my opinion this appeal must be dismissed with costs.

Adami, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 230

MANUK, J.

Harbans Narain Singh — Appellant.
v.

Bhajoo Nonia — Respondent.

Appeal No. 1043 of 1917, Decided on 17th January 1919, from appellate decree of Dist. Judge, Darbhanga.

(a) Civil P. C. (1908), O. 1, R. 8—Suit for declaration of proprietary right free from rights of highway—Procedure under R. 8, need not be followed—Specific Rel. Act, S. 42.

In a suit for a declaration that the plaintiff is the owner of a piece of land free from any right of highway, it is not necessary for the plaintiff to proceed by way of O. 1, R. 8. [P. 231 C 1, 2]

(b) Civil P. C. (1908) O. 1, R. 8—Provisions of R. 8 not called in aid—nor Court's permission taken—Decree binds only actual parties to suit.

Without however calling in aid the provisions of O. 1, R. 8, and obtaining the permission of the Court under that order, any declaration that the plaintiff might succeed in obtaining would bind only the actual defendants to the suit. [P. 231 C 2]

(c) Civil P. C. (1908), O. 1, R. 8—Relief sought against public generally—Provisions of R. 8 must be complied with

Where the plaintiff chooses to bind the public and gives a public character to his suit, he must comply with the provisions of O. 1, R. 8,

and must observe the conditions on which permission is given by the Court under that rule. [P. 231 C 2]

Saroshi Charan Mitter and *Sudhansu Kumar Mitter*—for Appellant.

Baikuntha Nath Mitter—for Respondent.

Judgment.—This appeal arises out of a suit which was instituted by the plaintiff-appellant for a declaration that a strip of land belonged to him and was not the site of a public road.

It appears that the defendant 1st party filed a complaint before the Sub Divisional Officer of Samastipore, alleging that the plaintiff had obstructed the land in dispute which according to the defendant 1st party was a public way. The defendant 2nd party joined the defendant 1st party in moving the Criminal Court. Thereupon, as the plaintiff alleges, the Magistrate made an enquiry in his absence, under S. 133, Criminal P. C. and on that enquiry passed an order absolute under S. 137, Criminal P. C., declaring the land in dispute to be a public way. The plaintiff's allegation is that on this and there originally stood the house of an under-tenant of his, one Mt. Nanubatia, on whose demise the house was pulled down and the land was turned by the plaintiff into cultivable field. When instituting this suit on 22nd June 1916 the plaintiff prayed for permission to sue under O. 1, R. 8, and the order sheet of the trial Court, shows that such permission was given, the plaint was registered and the notices required by O. 1, R. 8, were directed to be served, amongst others and advertisement to be published in the Official Gazette. For these notices the plaintiff was ordered to file Talbana and to deposit the fee for the publication in the Gazette, within a week. It is not clear whether he deposited any Talbana for any of the notices, but it is clear that he did not deposit the fee required for the publication in the Gazette. Apparently his laches in this respect was not noticed by anyone and accordingly the defendants appeared and filed their written statements. Amongst other points taken by the defence were that the suit was bad for defect of parties and that the land in suit had all along been a public thoroughfare. The learned Munsif has dismissed the plaintiff's suit, but without costs, because of his failure to deposit the fee for the ad-

vertisement in the Official Gazette and also because although some of villagers applied to be made parties on 17th August 1916 the plaintiff took no steps to bring them on the record. The judgment of the Munsif is dated 20th March 1917 and I can find nothing in the order-sheet which I have gone out of my way to peruse in order to see if there is any justification for the conduct of the appellant, to show that there was any attempt on his part to rectify the result of his laches in the matter of this deposit. What happened, however was that at the time of the argument he was so ill advised as to contend on the basis of the decision in *Mukh Lal Singh v. Jagdeo Tewari* (1) that it was the duty of the Court to have the advertisement published, presumably implying that it was also the duty of the Court to pay for the advertisement. Then after the close of the arguments, he applied to withdraw the suit with permission to bring a fresh suit. This application was very properly rejected, inasmuch as the plaintiff had already on a previous occasion been allowed to withdraw his suit on the present cause of action as he had not complied with the requirements of O. 1, R. 8. On the merits the learned Munsif found that the plaintiff's allegations were correct.

On appeal before the learned District Judge it was urged for the first time that O. 1, R. 8, did not apply and not being an imperative provision of the law the plaintiff's suit should not have been dismissed because he failed to comply with the terms imposed on him by virtue of that order in the matter of the cost of the advertisement. The learned Judge was of opinion that the public were necessary parties as defendants to a suit, which contained a prayer for a declaration that the public never had a right of way over the land in suit. In so holding the learned Judge overlooked the decision of a Full Bench of the Calcutta High Court in *Chunilall v. Ram Kishen Sahu* (2). It will appear from that decision that there is no reason on principle why a suit for declaration of this nature should not lie under S. 42, Specific Relief Act against anyone who formally claims to use such land as a public right and thereby endangers the title of the owner. From the report of that case

I gather that the suit had been instituted without adopting the procedure laid down in S. 30 of the then Civil P. C. That suit was also, to quote from the judgment of Wilson, J..

"brought practically for the purpose of obtaining a declaration that the plaintiff is the owner of the land free from any right of highway."

I am of opinion, therefore that it was not necessary for the plaintiff to proceed by way of O. 1, R. 8, when instituting the suit. The fact remains, however, that he elected to do so and that he thereby sought to give to his suit a wider and a different character to that which it would otherwise have had. It is obvious that without calling in aid O. 1, R. 8, and obtaining the permission of the Court under that Order, any declaration the plaintiff might have succeeded in obtaining would bind only the actual defendants to the suit and it may have been, as pointed out by the Full Bench in the Calcutta case, that such a decision would have been sufficient for his purpose. He chose, however to bind a larger public and having once given to his suit that character, I am of opinion that it was his bounden duty to comply with the conditions on which the permission under O. 1, rule 8, was given. The plaintiff finally in the lower Appellate Court prayed for permission at that late hour to amend his plaint by leaving out the word "public" and presumably substituting therefor the words "the defendants." The learned Judge refused to accede to the prayer on account of the repeated laches of the appellant. In exercising this discretion I am not prepared to say that the learned Judge was wrong. The appellant first brings a suit against the defendants on this cause of action. He then withdraws that suit with permission to bring a fresh suit on the same cause of action, because the provisions of O. 1, R. 8, had not been complied with. Next he brings his present suit and obtains permission to proceed under O. 1, R. 8, but neglects to pay for the requisite advertisement. When this is brought to his notice, he contends it is the duty of the Court to do this for him. When this contention is rejected, he seeks permission once again to withdraw his suit with permission to bring a fresh suit. When this is refused he appeals to the District Judge and urges that O. 1, R. 8, did not apply to his suit. Finally he seeks in August

(1) [1908] 55 Cal. 1021.

(2) [1888] 15 Cal. 460.

1917, i. e., more than a year after institution of the suit, to amend his plaint. Meanwhile, too, he had taken no steps to make parties certain villagers who applied to be so made.

The appellant on the face of his conduct is deserving of absolutely no consideration at the hands of the Courts. The learned Judge also observed, and rightly observed, that declaratory decrees are essentially discretionary, and whereas it was clear from the proceedings in the Criminal Court that a wider public were interested in this question, it was not a case in which he should exercise his discretion to allow the plaintiff to amend his plaint and proceed only against the three defendants. For the above reasons and having regard to the gross contempt for the orders of the Court shown by the plaintiff, I decline to interfere and dismiss the plaintiff's appeal with costs.

V.S./R.K

Appeal dismissed.

A. I. R. 1919 Patna 232

ATKINSON AND DAS, JJ.

Ram Lagan Sahu—Petitioner.

v.

Ram Birich Koeri — Opposite Party.

Civil Revn. No. 122 of 1918, Decided on 13th February 1919, from a decision of Munsif, Gopalganj, D/- 26-4-1917.

Civil P. C. (1908), Ss. 151 and 152—Courts have inherent power to amend decrees so that they may conform with judgments—Principle does not apply to compromise decrees—Decree not embodying true terms of compromise—Only remedy is by independent suit—Compromise.

An amendment of a decree under S. 152, Civil P. C., can only be justified where there is a clerical error or arithmetical mistake apparent on the face of it.

In some cases of a very transparent character for the purpose of rectifying an abuse and to effect the ends of justice, a decree may possibly be amended under the provisions of S. 151, Civil P. C., by a Court in the exercise of its inherent power. In addition, all Courts of justice have an inherent power to amend their decrees so that they may conform with the judgments of the Court itself and in such cases, and in such cases only, can the inherent power of the Court be relied upon to amend a decree which is not in conformity with the judgment of the Court. This principle however does not apply to a decree founded upon a compromise.

If a decree with the compromise embodied therein is inaccurate or does not embody the true terms of the compromise arrived at between the parties, then the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground ejusdem generis therewith.

[P 232 C 2]

Hari Bhushan Mukerji and *Harnandan Sahay*—for Petitioner.

Rajendra Prasad — for Opposite Party.

Judgment.—This application in civil revision is presented to us, in our revisional jurisdiction, to review an order of the learned Munsif of Gopalganj, dated 26th April 1917. It appears to us that the learned Munsif had no jurisdiction to make the amendment which he did in the original decree by the aforesaid order. The original decree was founded on a compromise; and the decree was in the terms of the compromise which was embodied therein; and it is perfectly clear and there is no room for ambiguity or doubt as to its purport and effect. On the face of the decree itself it is quite impossible to detect any clerical error or arithmetical mistake which would justify any amendment under S. 152, Civil P. C. This is the only section under which we think the learned Munsif could possibly have exercised the jurisdiction which he claimed to amend the decree in question on the petition presented by the judgment-debtor.

In some cases of a very transparent character, for the purpose of rectifying an abuse and to effect the ends of justice a decree may possibly be amended under the provisions of S. 151, Civil P. C., by a Court in the exercise of its inherent power. In addition, all Courts of justice have an inherent power to amend decrees, so that their decrees may conform with the judgment of the Court itself; in such cases, and in such cases only, can the inherent power of the Court be relied upon to amend a decree which is not in conformity with the judgment of the Court. This principle however does not apply to the present case, inasmuch as the decree is founded upon a compromise. If a decree with the compromise embodied therein is inaccurate, or does not embody the true terms of the compromise arrived at between the parties, then the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground ejusdem generis therewith. The principle governing such cases will be found laid down in the case of *Wilding v. Sanderson* (1). No doubt, as long as the decree remains in the form of a memorandum on the minutes of the Court,

(1) [1897] 2 Ch. 531.

it is open to the Court in the exercise of its jurisdiction to make any amendment it thinks fit in the minutes, but once the decree has been passed and signed then the remedy is, except in cases to which S. 152, Civil P. C., applies, to institute a suit to set aside that decree on one of the grounds aforesaid.

We must set aside the order of the learned Munsif dated 26th April 1917 and, by consent of the parties, we vary and modify the original decree dated 22nd October 1914, and declare that in lieu thereof it shall be decreed that the defendants do pay to the plaintiffs as and for damages the sum of Rs. 150 and that in addition the defendants shall pay to the plaintiffs as and for costs of the original suit the sum of Rs. 62 and no more. Let the record be returned to the lower Court and let the lower Court in pursuance of our order by consent draw up a fresh decree in the terms of the declaration hereinbefore made by us by the consent of the parties. The defendants will pay to the petitioner in the present application the sum of one gold mohur as the hearing fee of this application.

V.S./R.K.

Record returned.

A. I. R. 1919 Patna 233

ROE, J.

Premasukh Das—Appellant.

v.

Shah Gopi Saran—Respondent.

First Appeal No. 58 of 1919, Decided on 28th March 1918, from order of Tax Officer.

Court-fees Act (1870), S. 7 (10) (c)—Mortgage suit—Prayer for declaration that property was not subject to certain lien—As plaintiff really sought to obtain order that property should be sold free of lien, ad valorem court-fee had to be paid on value of lien.

Plaintiff brought a suit to recover money due on a mortgage-bond by sale of the mortgaged properties; it was also prayed that as defendant 3 had a deed of conditional sale reciting a mortgage prior to plaintiff's mortgage, the property might be sold subject to defendant 3's mortgage, or that he might be granted an opportunity to redeem. The suit was decreed and the property was ordered to be sold subject to the mortgage of defendant 3. The plaintiff appealed against the latter part of the decree, praying for its modification "by removing the condition as to priority of the deed of defendant 3 and its redemption by the appellant." He valued the appeal for purposes of jurisdiction at Rs. 14,000, the amount of defendant 3's mortgage, but he paid a Court-fee of Rs. 10 only for the declaratory

relief that defendant 3's bond had no priority of charge over his own:

Held: that the relief sought was not declaratory, but sought to obtain an order that the property be sold free of the lien declared by the trial Court., and that therefore ad valorem Court-fee must be paid on the value of the lien which it was sought to destroy. [P 234 C 1]

FACTS appear from the following order of the taxing officer: This appeal arises out of a suit for recovery of money due on a mortgage bond by sale of the mortgaged properties. Defendant 3 was impleaded because he had a deed of conditional sale in which there was a recital of a mortgage of the same properties, which was prior to plaintiffs' mortgage. Plaintiff impugned the documents as collusive, but he prayed that if they were held to be genuine, the mortgaged property might be sold subject to defendant 3's mortgage or that he might be granted equity of redemption. The mortgage suit was decreed, but it was ordered in the decree that the property should be sold subject to the mortgage of defendant 3. Plaintiff has appealed against this part of the decree. He prays that the lower Court's decree should be modified

"by removing the condition as to priority of the deed of defendant 3 and its redemption by the appellant."

For the purposes of jurisdiction he has valued the appeal at Rs. 14,000, the amount of defendant 3's mortgage bond. But he has paid a court-fee of only Rs. 10 for the declaratory relief that defendant 3's bond has no priority of charge over plaintiff's bond. The stamp reporter says that obviously such a declaration cannot be made without a consequential relief that the property will be sold free from prior encumbrances; that the appellant in this appeal seeks to get rid of the liability imposed upon him by the decree, and the appeal is therefore one for a declaration with consequential relief. The appellant's vakil does not accept this report, and he contends that the appeal is for a declaration, pure and simple and that no consequential relief is required. I may note that the lower Court held that plaintiff can get the property sold without redeeming defendant 3's mortgage, and that it being a prior mortgage, it was not necessary even to bring him on the record. It would appear that in the present appeal what the appellant wants is to get rid of the charge of Rs. 14,000 on the property. He is in effect appealing against so much of the decree as declares that defendant

3's mortgage is a charge on the property, and he desires to be relieved from the liability under the decree to that extent. The ruling in *Baji Lal v. Gobhardan Singh* (1) does not seem to be of assistance in this case, as there the decree for sale was passed conditionally on the plaintiff redeeming the prior mortgage. In the present case plaintiff has obtained the mortgage decree subject only to defendant 3's lien on the property. In *Venkappa v. Narasimha* (2) the appeal was by the defendant mortgagor against so much of the decree as declared the liability of his property to sale. In that appeal it was held that the proper stamp was on the value of the debt not exceeding the value of the property. The question would seem to be whether the simple declaration asked for is sufficient for plaintiff's purpose, and whether, once it is declared that defendant 3 has no priority of charge, the property can be sold free of any encumbrance. I am of opinion that the appellant is appealing against so much of the decree as places a prior charge of Rs. 14,000 on the mortgaged property, and is trying to get rid of that part of the decree by asking for a declaration only. I cannot find that any case of this kind has arisen before in this Court, and it is of importance as there are likely to be other cases of the same kind. I direct that it be placed before the taxing Judge for orders. My attention has also been called to *Moti Begam v. Har Prasad* (3).

Judgment.—I am satisfied that the relief sought in this appeal is not a declaratory relief at all. The Court of appeal is clearly asked to order that the property sold be sold free of the lien declared by the Court of first instance. On this relief an ad valorem Court-fee must be paid that is to say, a fee calculated on the value of the lien which it is sought to destroy.

V.S./R.K. *Order accordingly.*

(1) [1909] 31 All. 265=1 I. C. 1000.

(2) [1887] 10 Mad. 187.

(3) [1918] 47 I. C. 311.

A. I. R. 1919 Patna 234

DAWSON-MILLER, C. J. AND ADAMI, J.

Goiyan Dhangar—Appellant.

v.

Sheikh Gondar—Respondent.

Letters Patent Appeal No. 53 of 1918,
Decided on 27th June 1919.

Benami—Benamidar can sue for possession without joining beneficial owner.

A benamidar is entitled to maintain an action for recovery of possession of immovable property in his own name, without joining the beneficial owner as a party to the suit. [P 235.C 1]

Shiva Narain Bose—for Appellant.

S. N. Sahai—for Respondent.

Dawson-Miller, C. J.—This is an appeal under Cl. 10, Letters Patent, from the judgment of a single Judge of this Court dated 23rd April 1918: see *Guyan Dhangar v. Gondar* (1). The plaintiff sued for a declaration of title to and recovery of khas possession of certain land of which he had been dispossessed by the defendant. The plaintiff proved his title under a registered sale deed executed in his favour by the previous tenant in September 1913. The main defence was that the plaintiff's vendor, one Bandhu, was not the real tenant but was a benamidar of the defendant and therefore had no title which he could transfer to the plaintiff. This story was not accepted by the learned Munsif, nor did the defendant succeed in establishing a further defence that he had not dispossessed the plaintiff but had been in possession of the property himself all along. A further point was taken by the defendant that the suit was bad for nonjoinder of parties, the plaintiff's father being joint with the plaintiff although he had not been added as a party on the record. The Munsif thought that this did not affect the maintainability of the suit and he passed a decree in the plaintiff's favour. The defendant appealed to the Subordinate Judge and the only question which was argued before the Subordinate Judge, as appears from his judgment, was that the suit was not maintainable by the plaintiff. It appeared from the plaintiff's evidence that the land had been purchased by the plaintiff's father in the plaintiff's name and the plaintiff being therefore found to be a benamidar of his father the Subordinate Judge came to the conclusion, following certain decisions of the Calcutta High Court, that the plaintiff was not competent to maintain a suit for possession of immovable property.

On appeal to this Court the case came before a single Judge who, relying on the authority of *Atrabannessa Bibi v. Safatullah Mia* (2), upheld the decision of the Subordinate Judge. There was, at

(1) [1918] 45 I. C. 794.

(2) [1915] 43 Cal. 504=31 I. C. 139.

the time when that judgment was delivered, some conflict of opinion on this question in the decisions of the High Courts in India. Since then however the question has been finally determined by the judgment of their Lordships of the Privy Council in the case of *Chowdhuri Gur Narayan v. Sheo Lal Singh* (3). Exactly the same question came for determination before their Lordships in that case as has to be determined now, and in their Lordships' judgment which was delivered by Mr. Ameer Ali it appears that the question for determination there was whether a person who has no beneficial interest in the property which stands in his name or is acquired in his name can maintain an action in respect thereof. The facts of that case were very similar to the present. There was evidence to show that the purchase by one Mohesh Lal of a share in certain villages which were the subject-matter of the suit was really a purchase for the benefit of another person and that Mohesh Lal having purchased in that manner was the benamidar of the real beneficial owner. In that case as in the present case Mohesh Lal had persistently denied that he was a benamidar or that he had no beneficial interest in the property. The High Court came to the conclusion that there was good ground for supposing that Mohesh Lal was really only a benamidar. Now, in the present case, the Subordinate Judge and the learned Judge of this Court have also come to the conclusion upon the plaintiff's own evidence, in which he says that the property was purchased by his father in his name, that there was sufficient evidence to show that the plaintiff was really a benamidar. From the judgment of their Lordships of the Privy Council, to which I have already referred, it appears that they treated the case as one of a claim made by a benamidar for the possession of immovable property and upon that hypothesis came to the conclusion that there was no reason why a benamidar should not maintain an action in his own name without having the beneficial owner added as a party. The following passage, which occurs in that judgment, seems to me to make the matter quite clear:

"As already observed, the benamidar has no beneficial interest in the property or business

that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not a proceeding by or against his representative in its ultimate result is fully binding on him."

Then the judgment points out that in the case of a contest between the alleged benamidar and the alleged real owner other considerations might arise with which their Lordships were in that judgment not concerned. It seems to me that the circumstances of the present case are entirely covered by the decision to which I have just referred. There is no dispute by the beneficial owner, if it could be taken, as the learned Subordinate Judge has found, that the plaintiff was only a benamidar, that he has any adverse right which the benamidar's action in any way interferes with. There is no dispute between these parties. The beneficial owner, the benamidar's father, has not thought fit to intervene in the action or to interfere in any way, and the only contest is as between the benamidar and the defendant seeking to obstruct his possession.

It seems to me quite clear that the decision of the Judicial Committee to which I have just referred applies to the present case and that this is just the class of action in which they have laid down that a suit by a benamidar for the possession of immovable property is maintainable in India. In these circumstances the decision of the learned Judge affirming the decision of the Subordinate Judge must be set aside and the decree of the Munsif restored. We think that the appellant is entitled to his costs both here and in the two lower Courts and the result is that the appeal is allowed with costs here and of the appeal to the Subordinate Judge and of the second appeal to this Court.

Adami, J.—I agree.

V.S./R.K.

Appeal allowed.

(3) A. I. R. 1918 P. C. 140=49 I. C. 1=46 I. A. 1=46 Cal. 566 (P.C.).

A. I. R. 1919 Patna 236

DAWSON-MILLER, C. J. AND FOSTER, J.

Muhammad Kabir and another—Plaintiffs—Appellants.

v.

Shahdeo Sukul and others—Defendants—Respondents.

Second Appeal No. 681 of 1918, Decided on 13th August 1919, from decision of Dist. Judge, Saran.

Transfer of Property Act (4 of 1882), S. 53—Intention of defeating or delaying is essential—If transferor possessed of sufficient means transfer cannot be set aside.

There is nothing in S. 53 or in any other provision of the law to prevent a defendant in a suit from transferring either for consideration or voluntarily his property to another, unless the effect is shown to be that his creditors are defeated or delayed. Such a transfer made during the pendency of a suit, when obviously the defendant was in possession of ample funds with which to pay off his creditors, is not a fraudulent transaction nor a transaction entered into with the object of defeating his creditors.

[P 237 C 1]

Rajendra Prasad and S. Saran—for Appellants.

Dawson-Miller, C.J.—In my opinion this appeal must be allowed. The plaintiffs brought this suit to have it declared that defendants 4 to 11, against whom defendants 1 to 3 had obtained a money decree, had no right, title or interest in certain property which was attached by defendants 1 to 3 as decree-holders in execution of that decree. The facts of the case are shortly these that defendant 11, who was one of the judgment-debtors in the suit brought by defendants 1 to 3, owned certain properties and amongst others the property in suit in this case. After the suit was instituted which was in September 1911 but before any decree had been made in that suit, defendant 11, an old lady and grandmother of the plaintiffs, executed a deed of gift in favour of the plaintiffs, in respect of the property now in suit. It is not suggested that defendant 11 was in straitened circumstances or that she was not able either at that time or at any time subsequently to pay off such creditors as she may have had, including defendants 1 to 3. According to the findings of the Subordinate Judge it appears that in addition to the property in question she had a 5 annas 4 pies share in village Narainpur, a zarpeshgi right in village Fanusra, various sale certificates showing her right to certain kasht

lands and decrees standing in her name, and it does not appear that there is a word of evidence throughout the case to show that she was in any way unable to meet all her liabilities at the date when this decree was passed and when the property in question was attached, or at the time when she transferred the property by deed of gift to the plaintiffs in the year 1912. In these circumstances the learned Subordinate Judge came to the conclusion that in the present suit the plaintiffs had made out their case and were entitled to judgment. There is another matter which I ought also to mention and that is this: that out of the total decretal amount of Rs. 1,092, defendants 1 to 3 had already realized a sum of Rs. 768, leaving a balance of something less than one-third of the total decretal amount still due.

When the matter came before the District Judge, he seems to have thought that the fact that defendant 11 had plenty of other property out of which her creditors could be satisfied, was not a material matter to be taken into consideration in arriving at a conclusion as to whether the transfer was in fact one made with intent to delay or defeat creditors. He says that because the Subordinate Judge had based his decision upon a consideration of this question he had entirely missed the whole point of the case and that the Judge of the trial Court had omitted to consider what the learned District Judge said were the relevant dates in the case, and that once you consider the relevant dates, it must at once in his opinion put the plaintiffs out of Court. Then he gives the dates which he considers relevant in this case. They are these: the suit out of which the decree arose was instituted on 20th September 1911, that is, the suit by defendants 1 to 3 against the remaining defendants. Defendant 11 filed her written statement on 8th March 1912. The judgment was delivered on 30th July 1912, the decree was made on 31st July and the deed of gift is dated 9th May 1912, that is after the filing of the written statement and before delivery of judgment. The Judge says, when we consider these facts and also the fact that the father of the donees signed the written statement for the lady, it is impossible to hold that the deed was bona fide. He added:

"No Court could look at a deed executed in such circumstances, and I am surprised to find an experienced judicial officer doing so."

It is difficult to see how the learned District Judge could possibly have come to the conclusion that this transfer in the circumstances of this case, where the lady was obviously in possession of ample funds out of which to pay off her creditors must be taken to have been a fraudulent transaction or a transaction entered into with the object of defeating her creditors merely because it took place at a date when a suit was pending against her. There is absolutely nothing in the provisions of S. 53, T. P. Act, nor indeed in any other statute or law that I am aware of which prevents a defendant in a suit from transferring either for consideration or voluntarily his property to another unless the effect is shown to be that the creditors are defeated or delayed. The only evidence upon which the learned Judge has come to the conclusion that this is a transfer in order to defeat creditors is the fact that the transfer took place when a suit unconnected with the transferred property was pending, and it almost looks as if the learned Judge in considering the effect of S. 53, T. P. Act, if indeed he did consider it, was mixing it up in his own mind with the preceding section viz. S. 52, but however that may be it is quite clear that he based his decision upon evidence which was clearly no ground for arriving at the conclusion to which he came. He even goes to the length of saying that it makes no difference that the lady may have had other property. To my mind it makes all the difference in the world because if it is shown that the defendant in suit is well off, that is a very material circumstance in considering whether the transfer was governed by S. 53. In the present case there is clearly no evidence at all to support the conclusion arrived at by the District Judge and, in my opinion, this appeal must be allowed, the decree of the District Judge must be set aside, and that of the Subordinate Judge restored. The respondents have not appeared and the appeal is therefore allowed without costs.

Foster, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 237

JWALA PRASAD AND IMAM, JJ.

Sarafat Husain—Appellant.

v.

Khurshed Ali—Respondent.

Second Appeal No. 90 of 1918, Decided on 9th July 1918, from decision of Dist. Judge, Bhagalpore.

(a) Succession Certificate Act (1889), S. 16—Payment of debt to holder of certificate is sufficient discharge.

Payment of a debt due to the deceased to the holder of the succession certificate is a valid and sufficient discharge of the debt under S. 16, and the title of the holder of the certificate to collect debts due to the deceased is conclusive.

[P 238 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 10—Court passing decree ceasing to exercise jurisdiction—Court having power to try suit when application is made is competent to execute decree.

The power to execute a decree, is vested in the Court which passed the decree but in the event of the Court ceasing to exercise jurisdiction it would be exercised by the Court which would have power at the time when the application was filed to try the suit.

[P 238 C 2]

Khurshed Husain—for Appellant.

Mohamed Tahir—for Respondent.

Jwala Prasad, J.—This appeal arises out of an execution of a decree which was obtained by one Mt. Sahebjan on 28th April 1914, in the High Court of Calcutta. The decree is in respect of costs incurred by the decree-holder in the appeal filed by the judgment-debtor against an award made by the District Judge under the Land Acquisition Act. The decree-holder Sahebjan is dead. One Alikan put the decree in execution alleging herself to be the representative of the deceased decree-holder, but on objection by the judgment-debtor it was held that she had no right to execute the decree. This was disposed of on 22nd June 1916. The respondent Khurshed Ali obtained a succession certificate from the District Judge and filed the present application for execution as the representative of Sahebjan, the deceased decree-holder, on 22nd May 1917. The judgment-debtor objected to the execution by Khurshed Ali on the ground that the decree was barred by limitation. The Subordinate Judge, by his order dated 3rd November 1917, disallowed the objection and held that the execution of the decree was not barred inasmuch as in the prior execution of the decree by Alikan the liability under the decree was admitted by the judgment-debtor in his petition dated 22nd June 1916. Against this order of the Subordinate Judge the

judgment-debtor preferred an appeal to the District Judge.

This appeal was disposed of by the learned District Judge on 21st December 1917, agreeing with the Subordinate Judge that there was a valid acknowledgment of the liability under S. 19, Lim. Act. The judgment-debtor has now come to this Court in second appeal. Besides the aforesaid objection raised in the Courts below that the decree was barred by limitation, the judgment-debtor has raised the following objections:

(1) that Khurshed Ali had no right to execute the decree inasmuch as he was not a legal representative of the deceased decree-holder, and (2) that the Subordinate Judge before whom the execution of the decree was filed had no jurisdiction to execute the decree which was passed by his predecessor-in-office, inasmuch as the decree was obtained under the Land Acquisition Act and the present Subordinate Judge has not the power of a "Court" under the Land Acquisition Act. As to the first objection, namely, that the decree is barred by limitation, we are in full agreement with the views of the Courts below that there was a valid acknowledgment of the liability under S. 19, Lim. Act. This acknowledgment consists in the mention of the decree in para. 1 of the petition of the judgment-debtor dated 22nd June 1916, wherein it is said that "Mt. Sahebjan had obtained a decree for costs; she is not the predecessor of the petitioner (Mt. Alikan) nor is the petitioner her heiress." The above is a clear admission of the liability being subsisting under the decree. This is sufficient for the purpose of an acknowledgment under S. 19, Lim. Act. The contention is therefore overruled. As regards the locus standi of the appellant Khurshed Ali to execute the decree, it is sufficient to state that Khurshed Ali has obtained a succession certificate under Act 7 of 1889, and the certificate under the said Act is solely for the benefit of the judgment-debtor in order to protect him from the claim for the sum being made by a person other than the holder of the certificate. Payment to the holder of the certificate is a valid and sufficient discharge of the debt.

The effect of a certificate under the Act has been defined in S. 16 of the Act and it is obvious from a perusal of that section that the title of the holder of

the certificate to collect debts due to the deceased is conclusive. In this view it is not at all necessary to decide whether under the objection petition of 22nd June 1916, there is an acknowledgment of the right of Khurshed Ali to execute the decree. Cl. 3 of the objection is not a clear admission of the status of Khurshed Ali as the heir and legal representative of Sahebjan deceased. The contention of the appellant is disposed of upon the legal aspect of the question under the Succession Certificate Act. This contention is also overruled. The last contention is with regard to the jurisdiction of the Subordinate Judge to execute the decree. It is said that the Subordinate Judge has not got any power under the Land Acquisition Act, as the decree was passed by his predecessor-in-office who had been invested with the power of a "Court" under the Land Acquisition Act. No doubt under S. 37, read with O. 21, R. 10, the power to execute a decree is vested in the Court which passed the decree, but in the event of the Court ceasing to exercise jurisdiction it would be exercised by the Court which would have power at the time when the application was filed to try the suit. But there is absolutely no material upon the record upon which it can be determined whether the Subordinate Judge who is executing the decree is not vested with power under the Land Acquisition Act. The point was not raised in the Courts below and there is absolutely nothing to show that the contention of the appellant is at all correct. We are therefore unable to hold that the Subordinate Judge who has executed the decree was not vested with the power to do so. The presumption is that he had the power to execute the decree. The result is that this appeal is dismissed with costs.

Imam, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 238

DAWSON-MILLER, C. J. AND FOSTER, J.

Ramcharita Sahu—Appellant.

v.

Ram Narain Sahu—Respondent.

Misc. Appeal No. 214 of 1919, Decided on 1st August 1919, from decision of Sub-Judge, Mozufferpore.

(a) Limitation Act (9 of 1908), S. 5—Appeal against ex parte order under O. 21, R. 90, Civil P. C.—Delay due to prosecution of

application under O. 9, R. 9—Previous practice that O. 9 was held applicable to execution—Appellant misled by practice held sufficient cause.

A petition under O. 21, R. 90, Civil P. C., by a judgment-debtor was dismissed in default. He immediately instituted proceedings under O. 9, R. 9, of the Code asking that the case be reinstated and heard on the merits, but his application was rejected because, in the meantime, the High Court had held that O. 9, R. 9, did not apply to proceedings in execution of a decree, though before that decision the practice of the subordinate Courts had been to apply the provisions of the rule to proceedings in execution. The judgment-debtor appealed to the High Court, and, under S. 5, Lim. Act, applied that the time for appealing be extended:

Held: that in the circumstances, the applicant was entitled to the extension, as he had been misled by the practice which had hitherto prevailed in the subordinate Courts but which had recently been held to be wrong.

[P 239 C 2, P 240 C 2]

(b) Limitation Act (9 of 1908), S. 5—Delay for that period only which is required for prosecuting bona fide application can be excused.

An appellant applying under S. 5, ought ordinarily to be deemed to have acted with ordinary diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal, and his appeal should, in such a case, be admitted under the section. [P 240 C 1]

T. B. Sahai—for Appellant.

Guru Saran Prasad—for Respondent.

Judgment.—This is an application by the petitioner under S. 5, Lim. Act, asking that the time for appealing from an order made in the course of execution proceedings dismissing his application under O. 21, R. 90, Civil P. C., may be extended. The facts appear to be shortly these: The applicant was the judgment-debtor under a decree held by the opposite party. In execution of that decree for costs amounting to Rs. 1,300 certain property of the judgment-debtor was attached and advertised for sale. The petitioner thereupon filed a petition under O. 21, R. 90, but owing to circumstances which he refers to in his present petition he was not present before the Subordinate Judge when the matter came up for hearing. He states in his petition that he had good grounds for not being present. However owing to his absence his application under O. 21, R. 90, was dismissed for default. Immediately afterwards, within a day or so, he instituted proceedings under O. 9, R. 9, Civil P. C., asking that the case should be reinstated and heard on the merits. That applica-

tion came on for hearing on 17th May 1919. In the meantime it appears that by a decision of a Full Bench of this Court it had been ruled that O. 9, R. 9, and other rules of the Civil P. C., which related to suits had no application to proceedings in execution and therefore the learned Judge rejected that application on the ground that he had no jurisdiction in the matter. Before the decision of this High Court referred to there can be no doubt that in the subordinate Courts O. 9, R. 9, and other rules of a similar kind had been applied to proceedings in execution and therefore the petitioner contends that, owing to this practice which had hitherto prevailed to a large extent at all events in the Subordinate Courts, he had been misled and lulled into security, because thinking that he could get all he wanted by an application under O. 9, R. 9, if he could show any merits, it was not necessary for him to file a memorandum of appeal from the order dismissing his application by which he was aggrieved.

Section 5, Lim. Act, provides that any appeal or application for review of judgment or for leave to appeal or any other application to which the section may be made applicable by any enactment or rule for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. Therefore it would appear, *prima facie*, in the circumstances of this case that the applicant was misled by the practice which had hitherto prevailed in the subordinate Courts but which has recently been held to be wrong. Therefore he contends that under the provisions of S. 5, Lim. Act, indulgence ought to be extended to him because he made a bona fide mistake and he could not foresee the consequences. Therefore, if the time which was occupied by the applicant in endeavouring to have his case reinstated under O. 9, R. 9, be deducted from the total period between the order appealed against and the filing of the memorandum of appeal, which was on 26th June this year, he is clearly within time because, on 7th December, his application under O. 21, R. 90, was rejected and within a day or two of that he filed an application to have his previous applica-

tion reinstated under O. 9, R. 9, and that was not heard until 17th May 1919. Between 17th May and 26th June is little more than a month, so that it would appear if an indulgence is granted under S. 5, Lim. Act, that he was well within the time allowed for an appeal from such an order, which is 90 days.

It is contended, however, that he has not shown due diligence between 17th May when his application was rejected and 26th June when his memorandum of appeal was filed, and that no real reason has been assigned why he should have waited something rather over a month before filing his memorandum of appeal. This matter however has been dealt with more or less recently in a decision of their Lordships of the Privy Council in the case of *Brij Indar Singh v. Lala Kanshi Ram* (1) and the effect of that decision which is shortly described in the head-note is this: An appellant applying under S. 5, Lim. Act, ought ordinarily to be deemed to have acted with ordinary diligence, when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal, and his appeal should in such a case be admitted under the section. It would appear therefore that in this case, excluding the time which was occupied in taking proceedings which proved infructuous owing to a change in the law as laid down by this Court, the time occupied by the applicant in filing his memorandum of appeal was only something very little over a month. It does not seem to me that where he is in fact allowed 90 days and excluding the time mentioned only takes slightly over a month, it can be said in any view of the case that he has not acted with due diligence in seeking the only remedy which was open to him. Therefore I think this application, so far as that objection is concerned, ought to be admitted.

It was further contended on the authority of the case of *Dwarka Singh v. Layakat Ali Khan* (2) that it is not always a sufficient cause for presenting an

appeal after time that the appellant was unsuccessfully prosecuting an application for review of the judgment appealed against. I quite agree that the fact that there was such an application is not in all circumstances a reasonable cause for not having presented an appeal, but in the particular circumstances of the case mentioned it appears that the classes of cases in which the Court would hold that the prosecution of an application for review is not sufficient cause for extending the time for an appeal, are those classes of cases in which the review is really only a small matter and does not necessarily cover the same class of relief as the applicant would get by an appeal. Of course in such a case it is quite obvious that if he were intending to seek the larger remedy which he could not get by a review, then he ought to show due diligence, notwithstanding his review in filing his appeal. If he does not do so, it can hardly be said in such circumstances that the application for review was a good reason for not filing his memorandum of appeal. Or again where it is obvious that his review application cannot be heard and determined before the time limited for an appeal expires, then in such a class of cases possibly that fact may be taken into consideration in weighing all the circumstances and seeing whether in the discretion of the Court S. 5, Lim. Act, may be taken advantage of. In the particular case before us I do not think that any ground has been made out why the application should not be granted either on the ground of laches on the part of the applicant or on the ground that his application under O. 9, R. 9, would not really grant him at least as much relief as he would get by the present appeal. In my opinion this application should be granted and the time for appealing should be extended until 26th June 1919.

Foster J.—I agree.

V.S./R.K.

Application granted.

A. I. R. 1919 Patna 240

DAS, J.

Pahalad Singh—Defendant 2—Appellant.

v.

Sajiwan Rai and others—Plaintiffs—Respondents.

Second Appeal No. 488 of 1918, Decided on 18th July 1919.

(1) A. I. R. 1917 P. C. 156=45 Cal. 91=44
I. A. 218=42 I. C. 43 (P.C.).

(2) [1916] 34 I. C. 44.

(a) Civil P. C (5 of 1908), S. 151 and O. 21, R. 92—Sale in rent decree—Deposit under S. 174, Ben. Ten. Act made—Sale confirmed—Suit held maintainable and it could not be treated as application under S. 151 as there was no suit pending.

In execution of a rent decree certain property was sold and was purchased by P, who was not a party to the suit. Within 30 days of the sale the judgment-debtor deposited the decretal money with the usual penalty and talbana for notices, under S. 174, Ben. Ten. Act, and asked that the sale be set aside. Notices were not served and as the judgment-debtor took no further steps, the Court confirmed the sale. The judgment-debtor then brought the present suit to set aside the sale and to obtain possession. The appellate Court held that the suit was not maintainable, but that complete relief could be given under S. 151, Civil P. C., by treating the suit as an application under that section. The auction-purchaser appealed.

Held: (1) that the suit was maintainable and the plaintiff was entitled to the relief he claimed, but that S. 151 of the Code did not apply as an application under that section could only be made in a pending suit and as the Court had held that a suit did not lie there was no suit pending. [P 241 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 174—Notice to person affected by deposit is not essential.

Section 174 did not make it necessary for any notice to be served on the persons affected by an application under that section, and on the conditions imposed by the section being complied with, it was obligatory on the Court to set aside the sale. [P 243 C 1]

S. C. Mitter and S. K. Mitter—for Appellant.

Ram Pershad—for Respondent.

Judgment.—This appeal arises out of a suit brought by the respondent for setting aside the sale held on 7th January 1913. It appears that a rent decree was obtained against the respondent and in execution of that rent decree the property, namely Khasra Plots Nos. 121 to 127, were purchased by the appellant who, it will be useful to remember, is not the decree-holder. Within 30 days from the date of sale, the plaintiffs against whom the rent decree was passed deposited the decretal amount with the usual penalty and talbana for notices under S. 174, Ben. Ten. Act, and they asked in terms of that section that the sale may be set aside. It has been found by the lower appellate Court that the plaintiffs did deposit the decretal amount with the usual penalty. Notices however were not served, and as the plaintiffs took no further steps in the matter, the learned Munsif confirmed the sale. I have gone through the order sheet of the execution case and I do not find that the learned

Munsif refused the application of the plaintiffs for setting aside the sale under S. 174, Ben. Ten. Act, but he does say this:

"No steps taken by the judgment-debtor for service of notice on the auction-purchaser. The sale is therefore confirmed and the case is dismissed on full satisfaction."

The plaintiff has accordingly brought this suit for determination of his title to Khasra Plots Nos. 121 to 127, for setting aside the sale in execution of the rent decree obtained against him and for possession of the property. The lower appellate Court was of opinion that no suit was maintainable for obtaining the reliefs which the plaintiffs did claim in their suit, but it thought that the suit could be treated as an application under S. 151, Civil P. C., and complete relief could be given to the plaintiffs under S. 151 of the Code. This is erroneous. An application can only be made in a pending suit, and if the lower appellate Court was of opinion that the suit did not lie, it is clear that an application could not be made in such a suit. But I am of opinion that a suit is maintainable and that the plaintiffs are entitled to the relief claimed by them.

The question which has been argued before me at great length is this: Were the auction-purchasers entitled to any notice of the deposit made under S. 174, Ben. Ten. Act? If they were not entitled to such a notice, then the Court had no option but to set aside the sale, and further the Court had no power at all to confirm the sale, seeing that all the conditions laid down by S. 174, Ben. Ten. Act, had been satisfied. The learned vakil on behalf of the appellant urges that S. 174, Ben. Ten. Act, must be read along with O. 21, R. 92, Civil P. C., and when so read, it is clear that an order cannot be made under S. 174, Ben. Ten. Act unless notice of the application has been given to all persons affected by such an application. The question is one of importance and I desire to deal with this matter as fully as I am able to do.

Section 174, Ben. Ten. Act provides that

"where a tenure or holding is sold for an arrear of rent due thereon, then at any time within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside, on his despositing in Court, for payment to the decree-holder, the amount recoverable under the decree with costs, and for payment to

the purchaser, a sum equal to five per centum of the purchase-money,"

and then the section proceeds to say that:

"If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale, and 'the provisions of S. 315 (O. 21, R. 93), Civil P. C., shall apply in the case of a sale so set aside'".

It will be noticed that there is no provision at all in S. 174 for any notice to be served on the persons affected by an application under S. 174, Ben. Ten. Act, and I am not prepared to hold in the face of the clear and precise language employed in S. 174, Ben. Ten. Act, that such a notice is necessary. The learned vakil on behalf of the appellant has referred me first of all to two cases, *Janardhan Ganguli v. Kali Kristo Thakur* (1) and *Bungshidhar Haldar v. Kedar Nath Mondal* (2). The case of *Janardhan Ganguli v. Kali Kristo Thakur* (1) was a case where the application to set aside the sale was made expressly under S. 310-A, Civil P. C., and was made by a person not the judgment-debtor, and the whole controversy in that case was whether an application under S. 310-A at all lay, because it was contended that in a case between landlord and tenant the only application that could be made to set aside the sale would be under S. 174, Ben. Ten. Act, and as the applicant was not the judgment-debtor, therefore there was no remedy at all. The Court after a full discussion on the subject came to the conclusion that there was nothing to indicate that S. 310-A was intended not to apply to sales in execution of rent decrees. I do not read this case as laying down that the proviso laid down in O. 21, R. 92, Civil P. C., must be read as a part of S. 174, Ben. Ten. Act.

The next case relied upon is the case of *Bungshidhar Haldar v. Kedar Nath Mondal* (2). In that case one N obtained a decree against R for arrears of rent. On 13th February 1895 the holding was sold in execution of the rent decree and was purchased by K. On 13th March 1895, one B, who, it will be noticed, was not the judgment-debtor, applied to have the sale set aside under S. 310-A, alleging that he had acquired an interest in the property sold many years before the rent decree. No notice was served on the person affected by that application. It was held that the provisions of S. 310-A

may be applicable to sales of tenures held under the provisions of the Tenancy Act and that persons other than the judgment-debtor, whose immovable property has been sold, may apply under that section to have the sale set aside on complying with the conditions prescribed by the section. This case is no authority for the proposition that if the application was made under S. 174, Ben. Ten. Act, it would be necessary to serve notice on persons affected by such an application.

In my opinion the cases relied upon by the learned vakil on behalf of the appellant do not establish that the proviso to R. 92 applies to S. 174, Ben. Ten. Act, and I am not prepared to hold that the proviso does apply. But it has been argued by the learned vakil that at any rate S. 143, Ben. Ten. Act, provides in express terms that subject to any rules made by the Court and subject also to the other provisions of the Bengal Tenancy Act, the Code of Civil Procedure shall apply to all such suits. The argument is that if there is nothing in the Bengal Tenancy Act, which is the incorporating Act, to show that any particular provision of the Civil Procedure Code does not apply to the Bengal Tenancy Act, then that particular provision of the Civil Procedure Code must apply to the Bengal Tenancy Act by incorporation. I quite agree that if the Bengal Tenancy Act does not lay down any procedure for any particular matter, and if there is a complete procedure for that matter in the Civil Procedure Code, then, unless there is something to the contrary in the Bengal Tenancy Act, the procedure laid down in the Civil Procedure Code must apply to that particular matter. But there is neither principle nor authority for the proposition that where there is a procedure for that particular matter in the Bengal Tenancy Act itself, still it is necessary to go to the Code because the Code requires something more to be done than is necessary under the Tenancy Act. "If the incorporating Act," said Lord Westbury in *St. Sepulchre (Vicar & Church-Wardens of), In re* (3)

"gives itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject-matter of the general rule contained in the incorporated Act."

In this case, S. 174, Ben. Ten. Act, contains a complete rule on the subject,

(1) [1896] 23 Cal. 393.

(2) [1897] 1 C. W. N. 114.

(3) [1864] 33 L. J. Ch. 372.

and I am of opinion that the expression of that rule undoubtedly amounts to an exception of the subject-matter of the general rule contained in O. 21, R. 92, of the Code.

In my opinion the proviso to O. 21, R. 92, does not apply to S. 174, Ben. Ten. Act, and that therefore under sub-Cl. (2), S. 174 it was obligatory on the Court to set aside the sale as soon as the deposit was made within the thirty days. In support of the procedure laid down in sub-Cl. (2), S. 174, Ben. Ten. Act, it may be urged that the question is between landlord and tenant, and if there is no question at all that the deposit has been made within thirty days, there is no reason why any notice should be served on any person. The Court must of course, be satisfied that the conditions laid down in S. 174 have been complied with. It is not a question of law but is a question of arithmetic, that is to say, purely a question of calculation whether the amount recoverable under the decree, with costs, and, for payment to the purchaser, a sum equal to five per centum of the purchase-money, has been deposited by the judgment-debtor. In my opinion the Court should have set aside the sale as soon as the deposit was made by the judgment-debtor within thirty days from the date of sale. The next question is, what is the remedy of the judgment-debtor now. The learned vakil on behalf of the appellant argues first of all that if R. 92 applies, then, of course, the Court has no jurisdiction at all to set aside the sale, because R. 92 expressly provides that:

"No suit to set aside an order made under this rule shall be brought by any person against whom such order is made."

I have held that R. 92 is not applicable and therefore in my opinion, sub-S. (3), R. 92 does not apply at all. But it is further contended by the learned vakil that even if R. 92 does not apply, the order passed by the Court in the application under S. 174 was an order under S. 47, Civil P. C., and that therefore the only remedy available to the judgment-debtor was to appeal from that order and to come to this Court in second appeal, and he relies upon two cases as *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (4) and *Raghubar*

Dayal Sukul v. Jadu Nandan Missir (5). Both these cases were between the decree-holder and the judgment-debtor. The auction-purchasers in both these cases were the decree-holders and it was expressly laid down in the case reported as *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (4) that the question being between the decree-holder and the judgment-debtor, the application came expressly within S. 47, Civil P. C., and therefore the order was appealable. The learned Judges were very careful to say as follows:

"It is not necessary to lay down an inflexible rule that every order made upon an application under R. 89 falls within the scope of S. 47. The true nature of the order must be examined, and the character of the parties affected thereby ascertained, before it can be determined whether the order does or does not fall within the scope of S. 47."

In my view the opinion expressed by the learned Judges in the case reported as *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (4) is destructive of the argument advanced by the learned vakil. The case before me is not a case between the decree-holder and the judgment-debtor and therefore certainly so far as the cases reported as *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (4) and *Raghubar Dayal Sukul v. Jada Nandan Missir* (5) are concerned, it was not a matter within S. 47 at all and therefore there could not be an appeal from that order passed under S. 174, Ben. Ten. Act. It is next urged by the learned vakil that if R. 92 and S. 47 do not apply, then the only other remedy available to the judgment-debtor is to proceed by way of review of the order passed by the lower appellate Court. In my opinion there is no substance at all in this argument. I am of opinion that there being an infringement of the right of the judgment-debtor, the judgment-debtor was entitled to maintain a suit and that the Courts below had jurisdiction to grant complete relief to the plaintiff in such a suit. They have given complete relief to the plaintiff, although they were of opinion that such a suit did not lie. In my opinion the view taken by the Courts below that relief could be given only under S. 151, Civil P. C., is erroneous. The Court had power to give complete relief in the suit itself. As the relief has been granted, there is nothing further

(4) [1911] 10 I. C. 51.

(5) [1912] 13 I. C. 365.

to be said. I would therefore dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 244

JWALA PRASAD, J.

Jagernath Gir and others—Plaintiffs—Appellants

v.

Rajman Gir and others—Plaintiffs—Respondents.

Second Appeal No. 299 of 1917, decided on 28th February 1918, from decision of Sub.-Judge, Chapra.

(a) Civil P. C., (1908), O. 41, R. 27—R. 27 should not be used to supply defects and loopholes—Additional evidence should not be admitted unless there is any difficulty in deciding case upon evidence already on record.

The object of O. 41, R. 27, is not to supplement the evidence that a party is bound to produce and it should not be used with a view to supply defects and loopholes that a vigilant litigant is required to guard against in the conduct of his case. It is strictly prohibited for an Appellate Court to admit a document or any other evidence in appeal solely at the instance of a party and without having satisfied itself that there is any difficulty in deciding the case upon the evidence already on the record.

[P 245 C 1]

(b) Limitation Act (1908), S. 19—Acknowledgment to third person saves limitation.

An acknowledgment in a deed of assignment executed by the obligor in favour of a third person is sufficient to save limitation within the meaning of S. 19, Lim. Act.

[P 246 C 2]

Rajendra Prasad—for Appellants.

Nirsu Narain Sinha—for Respondents.

Judgment.—This appeal arises out of a suit for redemption of a usufructuary mortgage dated 22nd September 1875. The defendants are the appellants. The property in dispute belonged to one Dwarka Gir and after his death was inherited by the plaintiffs and the defendants. The plaintiffs have three-fourths share in the property and the defendants the remaining one-fourth. The mortgage sought to be redeemed was executed by Dwarka Gir in favour of one Nand Lal Gir, the ancestor of the defendants, for a consideration of Rupees 675. The defendants' case was that the suit for redemption was barred by limitation inasmuch as the defendants were in possession of the property by virtue of a usufructuary mortgage bond, dated 1st November 1821, said to have been executed by Bhabichan Gir, ancestor of the said Dwarka Gir, in favour of one Sheodayal Gir, whose descendants Arjun

Rai and Tilak Rai transferred the said mortgage to the defendants' ancestor, Nand Lal, by means of a deed of assignment, dated 25th July 1876. The first Court gave effect to the defendants' plea that they were in possession of the property on the strength of the usufructuary mortgage of 1821 and that the claim of the plaintiffs for redemption was barred. On appeal the learned Subordinate Judge held that the liability of the defendants for redemption of the mortgage of 1821 was acknowledged by Arjun and Tilak in a written statement filed by them in a suit of 1875, being No. 210 of that year, instituted by the said Dwarka Gir against them, and hence the period of limitation would be calculated under S. 19, Lim. Act, from the aforesaid acknowledgment in 1875. On the above finding the lower appellate Court held that the suit instituted in 1915 was not barred by limitation and decreed the plaintiff's suit on an account being taken of the mortgage of 22nd September 1875 as well as that of 1st November 1821 and of an ekrarnama of 20th July 1873 referred to in the deed of assignment of 25th July 1876. The defendants have appealed to this Court.

It is not disputed that there was an acknowledgment of the zarneshgi of 1821 in the written statement of Arjun and Tilak referred to above. The contention, however of the learned vakil on behalf of the appellants has been that the learned Subordinate Judge was wrong in admitting in appeal the aforesaid written statement of Arjun and Tilak under R. 27, O. 41, Civil P. C. This document was not at all filed on behalf of the plaintiffs in the Court of first instance, but the judgment in the aforesaid case between Dwarka Gir on the one hand and Arjun and Tilak on the other was accepted and marked Ex. D on behalf of the defendants. In the course of the argument on behalf of the respondent the attention of the learned Subordinate Judge was drawn to the passages in the judgment, Ex. D, relating to the averments in the written statement. A certified copy of the written statement along with other documents was filed before the Subordinate Judge. On consideration of all these, the lower Appellate Court thought it necessary to admit the written statement in order that it "may be enabled to pronounce judgment". The reason has been recorded

in the order-sheet of the 12th December 1916, by which order the Court further directed the plaintiffs to take steps to get the original of the written statement called for and the case was adjourned to the 18th December 1916, on which day the arguments on both sides were heard and the written statement was admitted in evidence and marked D. It does not appear that there was any objection on behalf of the defendants-appellants regarding the admission of the aforesaid written statement in evidence.

It is contended on behalf of the appellants that the effect of the admission of the written statement at that stage by the lower appellate Court was wrong and illegal, as the plaintiffs were bound to produce it in the first Court and that the document was admitted with a view to enable the Court to pronounce its judgment in favour of the plaintiffs. There can be no doubt that the object of R. 27 (b), O. 41, is not to supplement the evidence that a party is bound to produce and that it should not be used with a view to supply defects and loopholes that a vigilant litigant is required to guard against in the conduct of his case. The object of the section is clear from the words used in the section itself. It embodies a rule which is with a view to assist the Court which, after consideration of the evidence on the record produced by the parties, feels difficulty on account of some defect in the evidence produced by the parties to pronounce a satisfactory judgment in the case. It is strictly prohibited for an appellate Court to admit a document or any other evidence in appeal solely at the instance of a party and without having satisfied itself that there was any difficulty in deciding the case upon the evidence already on the record. This principle has been embodied in the well known Privy Council case of *Kessowji Issur v. G. I. P. Ry., Co.* (1), where the document was admitted by the Appellate Court before the argument was heard and the evidence on the record considered by the Court. The Court in that case also did not record any reason for admitting the document. The power of the Court to admit evidence in order to do justice between the parties is not denied and is affirmed by the rule of the Civil Procedure Code referred to in O. 41.

(1) [1907] 31 Bom. 381=34 I. A. 115 (P. C.).

The mere perusal of the order-sheet will show that when the argument on behalf of the appellants was being heard, the attention of the Court was drawn to the acknowledgment in the written statement referred to in the certified copy of the judgment already on the record. The Court considered the position and after careful consideration of all the evidence on the record upon the point came to the conclusion that the production of the written statement at that stage was necessary in order "to enable the Court to pronounce the judgment." It is suggested that the discretion used by the Court was not properly and judicially exercised. It is asking this Court to enter into the mind of the lower Appellate Court and to find out whether the Court really felt the difficulty or not. I confess that I am unable to concede this and to question the justice or fairness of the discretion exercised by the lower appellate Court. The cases cited by the learned vakil, for the appellant, notably the case of *Kalika Dutt Mandar v. Tulsi Mandar* (2), do not apply to this case. In the last case we were asked to compel the Court to admit a document which the Court in its discretion had refused to admit and had not considered it necessary for the purpose of enabling it to decide the case and to do justice to the parties.

This is not the case here. Here, the Court has exercised discretion and has considered it necessary that the document should have been produced and admitted in evidence in order to enable it to pronounce judgment. It is idle to ascribe any motive and to say that the discretion was used to enable the Court to pronounce judgment in favour of the plaintiffs, as is contended for by the learned vakil for the appellants. Apart from the reasons given in the order-sheet the lower appellate Court has discussed it in detail in lines 20 to 40 of p. 10 of the paper-book. Here he has given the reason as to how this document was found necessary to be admitted into evidence and I find myself in full accord with the view that the reference to the written statement in the judgment (Ex. 1) filed by the defendants was sufficient to put any conscientious Court on guard and to require the Court to peruse the written statement referred to in that

(2) [1917] 1 Pat. L. J. 435=37 I. C. 1009.

judgment. The averments in the written statement having been embodied in a solemn record of a Court of Justice, namely, in the judgment marked Ex. D, the Court was bound to look into the written statement to see if there was an acknowledgment of the liability of the right of redemption which could save the claim of the plaintiffs from being barred by limitation. I therefore hold that the Court was competent to admit the document in evidence under O. 41, R. 27, and that the requirements of that section as well as of the principles embodied in the aforesaid Privy Council case and also in the case of *Ambuja Ammal v. Appadurai Mudali* (3) have been fully satisfied. I therefore overrule the contention of the learned vakil for the appellants on this point.

It is then contended that the written statement has not been properly proved, and that it was marked without any proof of its having been signed by Tilak and Arjun or by their pleader. It appears to me that the document does not require any proof at all, as it is a document of the year 1875. The suit was filed on 8th May 1915, the document at the time, therefore was over 40 years old. Under S. 90 presumption as to the genuineness of the signature on the document of over 30 years arises, provided that the document is produced from proper custody. In the present case the original written statement was called for from the record room, which is the proper custodian of such documents. The document, therefore was produced from a proper custody and it must be presumed that the signatures on the document are in the handwriting of the persons in whose handwritings they purport to be. The document, therefore did not require any proof and was rightly admitted without it. The signatures of Arjun and Tilak appear to be in the handwriting of Arjun. There are also two other signatures which purport to be the signatures respectively of two vakils on behalf of Arjun and Tilak, viz., Saheb Raja, Vakil, and Muhammad Amir, Vakil. It will thus be presumed under S. 90 that the signatures of Arjun and Tilak are in the handwriting of Arjun and the signature of the two Vakils are in their own respective handwritings. But it is contended that it has not been proved that Arjun or

the aforesaid pleaders were duly authorized agents to sign on behalf of Tilak. There is no dispute as to the presumption which arises from the signature of Arjun himself. It is quite clear from the judgment, Ex. D, as well as from the written statement that both the brothers Arjun and Tilak were defendants in that case and the written statement was filed on their behalf by the pleaders. The pleaders are recognized agents under the Civil Procedure Code of the party whom they represent. I therefore hold that under Expl. 2 S. 19, Lim. Act, the document has been signed by the duly recognized and authorized agents on behalf of both the defendants. The contention is overruled.

Assuming for the sake of argument, and for argument only, that the lower appellate Court was wrong in admitting the written statement and that the document was not duly signed by Tilak, I am of opinion that the appeal of the defendants must fail on another ground, which I consider to be a firmer ground. The appellants in this case have rested their case upon the deed of assignment of 5th July 1876 and have used that document in their evidence. This document itself mentions the zarpeshgi deed of 1821 and recites that Arjun and Tilak, the mortgagees, were in possession of the property by virtue of the zarpeshgi of 1821 which they purport to convey in favour of the defendants for consideration. The liability of redemption of the Zarpeshgi of 1821 is admitted in this deed of assignment and it is acknowledged to the defendants, although not to the plaintiffs in this case. Under Expl. 1 to S. 19 the acknowledgment is valid, even if it is addressed to a person other than the person entitled to the property. The acknowledgment in this case was made to the defendants, who in respect of one-fourth share of the property occupied the position of mortgagor. The acknowledgment is, therefore valid under the section. The present case is similar in all respects to the case of *Dur Gopal Singh v. Kasheeram Panday* (4), where an acknowledgment by the mortgagee of their mortgage right in a deed of assignment executed by him to a third person was held sufficient to save the claim of the mortgagor from limitation. The case of

(3) [1915] 38 Mad. 414=30 I. C. 402.

(4) [1865] 3 W. R. 3.

Genda Mal v. Ilahi Buksh (5) is also to the same effect. Thus even the claim of the plaintiff is saved by the acknowledgment of the liability to redemption made in the deed of assignment of the 5th July 1876.

The result is that the appeal of the defendants should be dismissed, even if the written statement is not taken in evidence. The acknowledgment in the deed of assignment was not brought to the notice of the Courts below or else, I am sure, the Courts below would have given effect to it and held that the defendants' plea of limitation is invalid * * * The appeal is, therefore dismissed with costs.

V.S./R.K. *Appeal dismissed.*
(5) [1909] 1 I. C. 510.

A. I. R. 1919 Patna 247

DAWSON-MILLER, C. J. AND ADAMI, J.

Mt. Dhanial and another—Defendants—Appellants.

v.

Hakayat Pandey and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 61 of 1918, Decided on 15th July 1919, from decision of Jwala Prasad, J., D/- 6th June 1918, and reported in *A. I. R. 1919 Pat. 67*.

(a) **Hindu Law — Alienation — Necessity—Payment of rent is legal necessity—Sale of immovable property for payment of rent is not necessarily justified unless no other ostensible means to pay existed.**

The payment of rent is clearly a legal necessity, but a sale of immovable property for the purpose of discharging an obligation to pay rent is not necessarily justified on such grounds and unless it can be shown that there was no other ostensible means of satisfying a rent decree except by allowing the property to be sold at auction, it cannot be held that the sale of the property, as distinguished from the obligation to pay the rent decree, was justified by legal necessity.

[P 250 C 1]

(b) **Hindu Law — Alienation — Widow—Lessee agreeing to pay previous rent decree out of lease money—Failure to pay—Sale in execution of rent decree held not justified by legal necessity.**

A widow executed a zarpeshgi lease of certain property and out of the consideration for the zarpeshgi left a sum in the hands of the zarpeshgidar to pay off a previous rent decree. The zarpeshgidar failed to discharge the rent decree, with the result that the property was sold to satisfy the decree and was ultimately purchased by the zarpeshgidar. In a suit by the reversioners of the widow to challenge the validity of the zarpeshgi :

Held : that the sale in execution of the rent decree was not, in the circumstances of the case, justified by legal necessity. [P 250 C 2]

L. M. Ganguli—for Appellants.

Harnarayan Prasad—for Respondents.

Dawson-Miller, C. J.—This is an appeal under Cl. 10, Letters Patent, from a decision of a single Judge of this Court dated 6th June 1918 : see *Dhondhia v. Hekayat Pandey* (1).

The dispute is between the reversioners of a small holding of between 2 and 3 bighas of land and zarpeshgidars holding under a deed granted by the mother of the reversioners during her lifetime. The property is valued in the plaint at Rs. 140. The case has been the subject of no less than seven decisions before coming to this Court for final determination, having been remanded twice by the High Court on second appeal for further findings. This unfortunate state of affairs is due primarily to the slipshod manner in which the case was presented in the pleadings and argued before the lower Courts and until litigants in this province realize the importance of having their cases presented in the pleadings so as to raise clearly and concisely the questions to be determined and argued, I am afraid such instances will continue not unfrequently to occur.

Bishun Mahton died some time in 1903 or 1904. The exact date of his death it has been found impossible to determine with more precision on the evidence. He left a widow Mt. Ugmi and two daughters Bhodia and Gangia. Mt. Ugmi died in 1911. The daughters, who were the reversionary heirs to Bishun Mahton's property after the death of their mother, are the plaintiffs in the suit. In July 1905 Mt. Ugmi being then a widow executed in favour of defendants 1 to 4 a zarpeshgi of the property in suit. The sum advanced in consideration of the bond was Rs. 300. Of this sum Rs. 165 was stated to be to enable the widow to discharge a prior debt of her deceased husband. Rs. 55 was to pay a rent decree obtained against the widow for arrears of rent due in respect of the property for a period of three years from 1309 to 1312 Fasli, corresponding to 1902 to 1905 A. D. The balance of Rs. 80 was said to be for sums due from the widow to the zarpeshgidars themselves. It was found that the Rs. 55 was retained by the zarpeshgidars them-

(1) *A. I. R. 1919 Pat. 67=49 I. C. 841.*

selves in order to pay off the decree for rent and was not in fact paid to the widow. It was also found that there was no proof of any debt of Rs. 80 due to the zarpeshgidars and that this sum was not advanced. There was however proof that the Rs. 165 was advanced to the widow to pay her deceased husband's prior debts and it was found that to this extent only was there any legal necessity on the part of the widow for the alienation of the property under the zarpeshgi. It is clear therefore on these findings that so far as the zarpeshgi is concerned, the advance taken by the widow was partly justified on the grounds of legal necessity and partly not, and even if the deed purported to grant more than the widow's life-interest it could, on the authority of *Harikissan Bhagat v. Bajrang Sahai Singh* (2) and similar cases, be set aside by the reversioners on payment of the sum advanced for legal necessity, which was found to be Rs. 165 only.

The case however was complicated by the fact that the zarpeshgidars failed to pay the amount due under the rent decree although they had retained the money for this purpose out of the sum acknowledged in the zarpeshgi deed to have been advanced to Mt. Ugmi. The result was that the property was put up for sale in execution and purchased by defendant 5 in September 1908 and subsequently transferred by him to the zarpeshgidars themselves. The only other principal defendants are Nos. 6 and 7 who are cosharers with No. 5. These seven defendants defended the action and are the present appellants. The remaining defendants are the thicadars.

It is only necessary to state the facts just mentioned to show that the sale of the property in execution of the rent decree during the widow's lifetime did not arise out of any inability on her part to the amount due, she having raised the money for that very purpose and although the payment of rent and the alienation of property for that purpose if circumstances render it necessary, can be justified on grounds of legal necessity the sale in execution in the circumstances would hardly appear to be justifiable on such grounds. Moreover, the facts show that at the time when the sale took place defendants 1 to 4 were in possession as zarpeshgidars and although

they had retained a portion of the consideration payable by them under the deed to satisfy the decree, they nevertheless stood by and allowed execution to proceed, afterwards taking a transfer of the purchaser's interest. These are all matters which create the gravest suspicion as to the good faith of these defendants. This consideration was one which very forcibly impressed the learned Munsif who tried the suit in the first instance. He came to the conclusion that the zarpeshgidars (defendants 1 to 4) and the thicadars (plaintiffs in the rent suit) conspired together to bring the holding to sale and in order to create difficulties for the reversioners, allowed a third person (defendant 5) to purchase at the ludicrously low price of Rs. 51, so that the zarpeshgidars could then take a transfer from the auction-purchaser instead of themselves buying at the auction sale and so rob the reversioners of their holding. The Munsif also found that the purchase at the auction sale only passed the life interest of the widow the decree-holders being fractional landlords only. He accordingly decreed the suit for possession on payment to the zarpeshgidars of the sum of Rs. 165, the amount of the consideration found to have been paid to the widow and justified by legal necessity. With the other issues we are not now concerned. From this decision the defendants appealed and on 10th July 1914 the District Judge allowed the appeal and dismissed the suit. On the question as to what interest passed at the auction sale his judgment was somewhat perfunctory. He said:

"Ugmi was a party to the rent suit and no fraud in connexion with it is proved. I do not know why the Munsif has held that it binds the holding only so long as the widow's interest lasted. Rent is a legal necessity and I hold that the rent decree had the full force of a rent decree."

The Munsif, as I have above indicated, had found, apart from other questions affecting the validity of the decree, that as the decree-holders in the rent suit were not the whole body of landlords but fractional landlords only, the suit was not one within S. 148-A, Ben. Ten. Act, and the decree, therefore had only the effect of a money decree. Hence, what passed at the auction sale was not the holding itself but only the right title and interest of the judgment debtor,

Mt. Ugmi viz., her life-interest, and that the plaintiffs' interest as reversioners did not pass by the sale. The learned District Judge on appeal does not appear to have considered this aspect of the case. The plaintiffs then appealed to the High Court. On 4th May 1916 the case came before a single Judge of the High Court, who set aside the decree and remanded the case for rehearing. He considered it was essential to ascertain whether the amount claimed in the rent suit brought against the widow was for arrears which became due in her lifetime or in the lifetime of Bishun, her husband, he being of opinion that, in the latter event, the rent decree would pass an absolute interest in the holding notwithstanding the fact that the plaintiffs in that suit were some only of the cosharer landlords. The date of Bishun's death had not at that time been clearly ascertained. He also directed the Court to find how much of the Rs. 300, the consideration for the zarpeshgi, was for legal necessity, the lower appellate Court having come to no finding on this point. The lower appellate Court on remand found that Bishun died in 1310 or 1311 Fasli and, as part of the rent accrued during his lifetime, that an absolute title passed to the auction-purchaser, and dismissed the claim. The Court also found, agreeing with the Munsif, that Rs. 165 only of the zarpeshgi money was advanced for legal necessity, that the Rs. 55 had been retained by the zarpeshgidars to pay off the rent decree, which they never paid, and that the balance of Rs. 80 was never due to them. The plaintiffs appealed from this decision to the High Court and the case was heard by a different Judge, who remanded the case again for the lower Court;

"to determine if the rents of the Musammat's time were such as would make the sale for those arrears for legal necessity."

On second remand the lower appellate Court found that there was no legal necessity for the sale of the holding in execution, as the decretal amount should have been paid out of the zarpeshgi money, and, if the widow and the zarpeshgidars between them failed to do this and allowed the property to be sold it was obviously unjust that the reversioners should suffer thereby. When this finding was remitted to the High Court the learned Judge held that the sale,

not being justified by legal necessity but being due to the neglect of the zarpeshgidars themselves to pay the decree-holder out of the moneys they had retained for that purpose, was not binding on the reversioners and that they were entitled to redeem the property on payment of the sum of Rs. 165, the only portion out of the sum alleged to have been advanced by the zarpeshgidars which was shown to have been for legal necessity. He accordingly allowed the appeal setting aside the decree of lower appellate Court, and restoring that of the Munsif.

From that decision the present appeal has been preferred by the defendants. The appellants contended, first, that the zarpeshgi granted by the widow to defendants 1 to 4 entitled them to retain the property until the sum advanced was paid off; and secondly, that the interest which was purchased at the auction-sale in execution of the rent decree by defendant 5 and afterwards transferred by him to the zarpeshgidars (defendants 1 to 4) passed an absolute interest in the property subject to encumbrances and not the life-interest of the widow only, and as the only encumbrance was their own zarpeshgi, defendants 1 to 4 had acquired an absolute title to the property. As to the first point, it has been found as a fact that the consideration money which actually passed to the widow was Rs. 165 and, therefore the plaintiffs would be entitled to redeem on payment of this amount. The sum of Rs. 55, alleged to have been advanced for payment of the rent decree, would have been claimable on the ground of legal necessity either if this sum had been paid to the widow or if the defendants who retained it in order to satisfy the decree had discharged their obligation in that respect, but this they failed to do. With regard to the second point the case stands thus: The decree-holders were fractional landlords only and therefore the decree obtained by them did not operate as a rent decree under S. 148-A, Bengal Tenancy Act, and what passed at the sale was *prima facie* only the interest of the judgment-debtor, that is to say, the life-interest of Mt. Ugmi. The learned Judge however who remanded the case in the first instance held that, if the decree was for rent payable in the lifetime of Bishun,

the sale would pass the whole interest in the property. It now turns out that the decree was for rent which accrued partly in Bishun's lifetime and partly in that of his widow, the judgment-debtor. It has also been found that, in so far as the sale took place in execution of a decree for rent which accrued during the widow's lifetime, there was no legal necessity for the sale. Moreover, the payment of rent by a limited owner is, in my opinion, a personal obligation on the part of the tenant and not a liability which affects the property as a whole, and the learned Judge who heard the appeal after the second remand came to the conclusion that, where a sale takes place under circumstances which render it partially voidable owing to the want of legal necessity, the whole sale must be set aside and the purchasers are only entitled to payment of that part of the judgment-debtor's liability which justified the sale on the ground of legal necessity. From this it would appear to follow that whilst the plaintiffs could set aside the sale they would be under an obligation to pay to the auction purchasers at all events a sum equivalent to the rent which accrued during Bishun's lifetime.

In the present case however the auction-purchasers have transferred their interest to the zarpeshgidars and have ceased to have any further interest in the property. The zarpeshgidars must therefore be treated as in the position of auction-purchasers; and had the sale been justified, even to the extent of the rent payable in Bishun's lifetime on the ground of legal necessity, I think they would be entitled to recover from the plaintiffs the amount of that rent before the sale could be set aside. Some confusion has arisen in this case in some of the judgments by a failure to keep clearly in mind the distinction between a debt the payment of which can be treated as a legal necessity and the sale of property for the purpose of discharging that debt. The payment of rent is clearly a legal necessity, but a sale of immovable property for the purpose of discharging an obligation to pay rent is not necessarily justified on such grounds, and unless it can be shown that there was no other ostensible means of satisfying the rent decree, except by allowing the property to be sold at auction, it could not be held

that the sale of the property as distinguished from the obligation to pay the rent decree, was justified by legal necessity. In the present case it is abundantly clear that no legal necessity for the sale of the property in pursuance of the rent decree against the widow has been made out. What happened was that money was in fact raised by the zarpeshgi granted to defendants 1 to 4 for the very purpose of satisfying the rent decree. The defendants themselves retained out of the consideration money for the zarpeshgi a sum of Rs. 55 for the purpose of satisfying the rent decree, and had they carried out their obligation in this respect the property would not have been sold. The only reason why the property was in fact sold was because defendants 1 to 4 either wilfully or through neglect failed to carry out that part of their obligation. They cannot now be allowed to set up a title which is entirely based not upon any legal necessity but upon their own laches. The result is that the appeal must be dismissed. The respondents are entitled to their costs of this appeal.

Adami, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 250

ATKINSON AND COUTTS, JJ.

Ghulam Mohiuddin and others—Petitioners.

v.

Emperor—Opposite Party.

Misc. Revn. No. 14 of 1919, Decided on 14th April 1919, from order of Dist. Magistrate, Bhagalpore, D/- 22nd March 1919.

Criminal P. C. (5 of 1898), S. 528 — Powers of transfer should be exercised not capriciously or arbitrarily — Time for disposal very little—No sufficient reason for transfer.

Although a District Magistrate has very wide powers of transfer conferred upon him by S. 528, Criminal P. C., he must in the exercise of these powers act in a judicial manner and not capriciously or arbitrarily. [P 251 C 2]

The fact that a Magistrate before whom a case is pending is also the Treasury Officer and has very little time at his disposal by virtue of his duties as a Treasury Officer is not a sufficient reason for directing a transfer of the case from his Court. [P 251 C 2]

Manuk and Athar Hussain—for Petitioners.

Sultan Ahmad—for the Crown.

Judgment.—The petitioners in this application apply to us to set aside an order of transfer made by the District Magistrate of Bhagalpore, dated 22nd March 1919, transferring the trial of this case from the file of Mr. Lane to the file of Mr. Beal, a Joint Magistrate now stationed at Bhagalpore. The petitioners are charged with the offence of having directed that an assault should be committed on a convict and whereby the convict died as a result of the injuries that he received. The charge was preferred against the accused by a Deputy Magistrate by the name of Mr. Girish Chandra Datta on 4th March of the present year. The case was transferred from the file of Mr. Datta to the file of Mr. Lane at the request of the accused by the District Magistrate of Bhagalpore, Mr. Johnston. At the time the transfer was made from the file of Mr. Datta to the file of Mr. Lane, there was no other available Magistrate in the District of Bhagalpore except Mr. Lane who was capable of trying the case; accordingly Mr. Lane was selected as the proper officer to try the case by Mr. Johnston, even though his duties were primarily connected with the treasury, Mr. Lane being Treasury Officer. Mr. Lane accordingly under the order of the District Magistrate, was seised of the case on 6th March. Mr. Beal joined as a new Joint Magistrate in Bhagalpore on 6th March or immediately after 6th March. The presence of Mr. Beal in Bhagalpore in no way induced Mr. Johnston to make any transfer to Mr. Beal of the case of the petitioners from the file of Mr. Lane on the ground of general public convenience.

The case proceeded before Mr. Lane, and two witnesses were examined for the prosecution. Mr. Lane made two orders both of which were objected to by the Public Prosecutor; the first was an order to the Superintendent of the Bhagalpore Jail directing that the prisoners, namely, the petitioners and their counsel, should be allowed to inspect the Jail for the purpose of enabling them to appreciate the nature of the defence which they would have to make, by an inspection of the Jail precincts and surroundings. Secondly the Public Prosecutor objected very strongly to the ruling of Mr. Lane that the accused's counsel was not bound to cross-examine the Crown witnesses immediately on the conclusion of their ex-

amination-in-chief. In our opinion the order of Mr. Lane to the Superintendent of the Jail was an improper order and one that should not have been made. It would appear that these two rulings of Mr. Lane perturbed somewhat the equanimity of the Public Prosecutor; who forthwith on 10th March applied to the District Magistrate by a petition seeking to have this case transferred from the file of Mr. Lane to the file of some other Magistrate and urging these two objections as the grounds in support of his petition. The learned District Magistrate made an order transferring the case, not directly on the two grounds taken by the Public Prosecutor in his petition, but stating generally that in his opinion in the interest of public convenience it was desirable that the transfer should in fact be made, inasmuch as Mr. Lane as Treasury Officer could not devote his entire time to the disposal of the case and it would be a hardship both upon the Crown and the prisoners to have the proceedings unnecessarily delayed, and accordingly Mr. Johnston transferred the case. Application was made to us to have the order of transfer set aside; and we came to the conclusion that it was desirable that a Rule should be issued to enable us to see what was the real reason operating in the mind of the District Magistrate for granting the transfer. Was it the reason suggested by the Public Prosecutor?

No doubt a District Magistrate has very wide powers of transfer conferred upon him by S. 528, Criminal P. C., but in the exercise of these powers he must act in a judicial manner and not capriciously or arbitrarily. Neither the District Magistrate nor the learned Government Advocate appearing on behalf of the Crown suggests that Mr. Lane is incapable either legally or physically from discharging his duties and continuing to try this case; and the only ground put forward, why he should not do so, is that he has very little time at his disposal by virtue of his duties as a Treasury Officer. That objection can be easily overcome; because it is open to the District Magistrate to allow Mr. Lane to discontinue his treasury duties for a short time to enable him to dispose of the case of which he now has seisin under the order of the District Magistrate himself, dated 4th March. No ground that we can see

has been urged by Mr. Johnston in his explanation by way of cause shown that would properly justify us in holding that his order of transfer, dated 22nd March 1919 was made and based on an exercise of sound and reasoned judicial discretion. Mr. Manuk endeavoured to attach an importance to this application by asserting that a grave question of principle was involved. Certainly his argument did not impress us. Mr. Manuk suggests that the vice of the method of the procedure adopted by the Public Prosecutor in this case to secure a transfer was that it was virtually a proceeding which enabled the District Magistrate as prosecutor to secure and nominate his own forum for the trial of the accused which might prejudicially affect the accused's right of fair trial. There is no ground whatsoever for this assertion, nor do the facts disclosed remotely justify the making of such an allegation. We are satisfied that the learned Magistrate ought not to have transferred this case from the file of Mr. Lane on the ground relied on by him for doing so. There is no impeachment of Mr. Lane's willingness and ability to discharge his duties in trying this case and his impartiality has not been impugned. Accordingly we set aside the order of Mr. Johnston, dated 22nd March 1919, and we direct that the case be restored to the file of Mr. Lane for disposal and the trial do proceed de die in diem until it is concluded.

V.S./R.K.

*Order set aside.***A. I. R. 1919 Patna 252**

DAS, J.

Mukhlal Pandey—Appellant.

v.

Kesho Prasad Singh Bahadur—Respondent.

Appeals Nos. 541 and 542 of 1918, Decided on 4th August 1919, from appellate decrees of Sub-Judge, Shahabad.

Deed—Construction—Manuscript matter added to printed form conflicting—Manuscript must prevail.

Where in a printed form of a lease there is a manuscript portion at the end of the printed portion, and there is a conflict between the printed portion and the manuscript portion, the manuscript portion must prevail over the printed portion. [P 252 C 2]

*Sheo Saran Lal and Sant Prasad—*for Appellant.

*Kulwant Sahai and Nirsu Narayan Sinha—*for Respondent.

Judgment.—This is an appeal on behalf of the tenant. The full amount of the rent has been deposited in Court, and the only question before me is whether the lower appellate Court was right in holding that the plaintiff was entitled to recover from the defendant interest; and secondly, whether the mode of calculation in preparing the decree is the correct mode. This is the only question which I have to determine. The lease is contained in a printed form, but there is a manuscript portion at the end of the printed form. According to all canons of construction, if there is any conflict between the written portion and the manuscript portion, the manuscript portion must prevail over the written portion. Now the written portion provides that the annual rent of Rs. 4,000 shall be realized by regular instalments detailed below, namely, in four instalments: Kuar 4 annas, Pous 4 annas, Chait 4 annas, and Jeth 4 annas. The lease then provides that in default of the payment of rent by instalments from year to year, interest at 1 per cent. per month or damages prescribed by law shall be realized from the defendant. This is, as I have said, in the written portion of the lease but the manuscript portion is as follows:

"Be it known that the rent of the lands settled shall have to be paid according to measurement after deducting the bal panchat lands."

This condition is an important one, when we remember that the lands are subject to alluvion and diluvion and that sometimes it is possible for the tenant to cultivate the whole area and sometimes it may be impossible for the tenant to cultivate any portion thereof. In my opinion the manuscript portion is the real contract between the parties since there is a clear conflict between the printed portion and the manuscript portion. In my view the rent for three instalments becomes due as soon as the measurement is made, and the finding of the lower appellate Court is that the measurement is made in Chait and then the tenant must pay for the three instalments in Chait and for the fourth instalment in Jeth. This, I think, is the view of the lower appellate Court, which says:

"It seems to me only reasonable to suppose in the absence of express agreement that the rent for the year falls due at the close of the year, by which time the tenant has had the use of the

land for the period for which he agreed to pay and the measurement has been done."

Mr. Sheo Saran Lal, on behalf of the appellant, relies on this portion very strongly and he says that it is a clear finding of fact by the lower appellate Court that the rent does not become due till the end of the year, and as the suit, so far as the rent for 1323 was concerned, was brought before the end of the year, the plaintiff was clearly not entitled to any interest for the rent due in respect of 1323. But the learned District Judge proceeds to say as follows:

"I hold therefore that the rent was in arrear when the suit was instituted and that the suit is not premature."

In my view the lower appellate Court really intended to find that the rent for the three quarters became due after measurement and that therefore the suit was not premature. In any case this is a question that depends purely upon the construction of a single document upon which the rights of the parties depend, and on a construction of that document I come to the conclusion that the rent became due to the plaintiff in Chait for three quarters and in Jeth for the fourth quarter. Clearly therefore the suit was not premature. The next question therefore is how is the interest to be calculated. The lower appellate Court has held that the plaintiff is entitled to interest at 12 1/2 per cent. The method of calculation in the decree is somewhat inartistic if not incorrect. The proper method would be to calculate interest at 12 1/2 per cent. from the time when the rent actually fell in arrear, that is to say the end of Chait and end of Jeth. I do not think that the lower appellate Court really intended to come to a different conclusion but the decree has, in my opinion, been drawn up in a very inartistic manner. I would therefore send the case to the lower appellate Court for drawing up the decree in accordance with my observations. The appeals are disposed of in accordance with these observations. I make no order as to costs in this Court.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 253

DAS, J.

Jankey Rai and another—Petitioners.
v.

Emperor—Opposite Party.

Criminal Revn. No. 104 of 1919, Decided on 29th April 1919, against order of Dist. Magistrate, Monghyr, D/- 6th January 1919.

Criminal P. C. (1898), Ss. 367 and 263 — Judgment in summary trial must contain brief statement of reasons for finding.

The law requires that a Magistrate or a Bench of Magistrates in a summary trial should give a brief statement of the reasons for their finding. A judgment in a single line is not a judgment in accordance with the law. [P 253 C 2]

S. A. Sami—for Petitioners.

Judgment. — The petitioners have been convicted in a summary trial under S. 323, I. P. C., and sentenced to a fine of Rs. 40 each.

The law requires that a Magistrate or a Bench of Magistrates should in a summary trial give a brief statement of the reasons for conviction. The learned Magistrate hearing the case has first of all considered the theory put forward on behalf of the defence and rejected that theory as rather fantastic. Then dealing with the prosecution case he says:

"The prosecution case has been fully proved by the evidence of three witnesses, besides the medical evidence."

So far as the medical evidence is concerned, obviously it does not touch the petitioners because their case is that there was undoubtedly a mar peet in which other persons took part. I cannot accept a judgment in a single line as a judgment in accordance with law. The course adopted by the learned Magistrate has necessitated my going through the evidence in the case and having gone through the evidence I am of opinion that there is a very grave doubt whether the assault was in fact committed by the petitioners. I would therefore set aside the conviction and direct that the fine, if paid, be refunded to the petitioners.

V.S./R.K.

Conviction set aside.

A. I. R. 1919 Patna 254

JWALA PRASAD AND FOSTER, JJ.

E. W. C. Moore and another—Defendants—Appellants.v.
Makhan Singh — Plaintiff — Respondent.

Second Appeal No. 1247 of 1917, Decided on 15th August 1919 from decision of Addl. Sub-Judge, Mozufferpur, D/-27th August 1917.

(a) **Transfer of Property Act (4 of 1882), Ss. 106 and 117—Tenant holding over with landlord's consent remains tenant and cannot set up adverse title—Adverse possession.**

A lessee, who, after expiry of the term of his lease, holds over with consent of the lessor, occupies the same character as he did under the expired lease, and has no right to set up any title adverse to that of the lessor and in derogation of the rights of the latter. [P 255 C 2]

(b) **Transfer of Property Act (4 of 1882), Ss. 106 and 117 — Consent to tenant holding over does not create new tenancy.**

The mere consent of a landlord to a tenant holding over after the expiry of the term of his lease, during the pendency of negotiations for a fresh lease, does not create a contract of tenancy. [P 256 C 2]

(c) **Transfer of Property Act (4 of 1882), S. 106—S. 106 does not apply to agricultural tenancies unless so made by Local Government**

Except in so far as its provisions may be made specially applicable by the Local Government to agricultural leases, S. 106 has no application to such leases. [P 256 C 2]

(d) **Transfer of Property Act (4 of 1882), S. 117 — Tenant holding over — Notice of ejectment is not necessary.**

A tenant who holds over against the wishes of the landlord is not entitled to any notice to quit before a suit for ejectment is filed against him. [P 256 C 2]

S. C. Mitter and S. K. Mitter — for Appellants.

L. N. Singh—for Respondent.

Jwala Prasad, J.—This appeal arises out of a suit brought by the landlord to eject the defendants from the lands in suit, said to consist of 4 bighas of zerait land.

On 4th March 1898, on behalf of the plaintiff, his mother gave to the defendants a lease called Sadhaua Patawa theka of 5 annas 6 gandas 2 cowries 2 karants pucca patti bearing Touzi No. 5510/2 in Mouza Tandaspur Joka, Pergana Nezamuddinpur Bogra, along with the shares owned by the plaintiff in other mauzas. The share leased in the mauza included some lands in the direct possession of the lessor. The lease was for a term of 9 years from 1306 to 1314 F.S. After the expiry of the lease the defen-

dants, upon the requisition of the plaintiff, gave up possession of the leasehold property from the month of Kartick 1315 F. S. with the exception of 4 bighas of the zerait land in dispute. The plaintiff's case is, as stated in para. 5 of the plaint, that the defendants continued in possession and occupation of the land in suit on the pretext of obtaining a fresh lease in respect of the shares in the mauzas as mentioned in the Sadhaua Patawa lease referred to above, and upon that pretext they obtained permission of the plaintiff to continue in possession of the land in suit during the pendency of the negotiations regarding the renewal of the lease in the village. The negotiations however fell through. The plaintiff then demanded possession of the land in suit from the defendants, but the defendants declined to give up possession of the land.

In 1911 the plaintiff instituted a suit No. 730 of 1911, for ejectment of the defendants from the lands in suit, upon the ground that the defendants were trespassers upon the lands and that the said lands were the zerait of the plaintiff. The defendants in that suit pleaded that they were in possession of the lands in pursuance of an oral agreement arrived at between the parties, whereby the plaintiff had agreed to allow the defendants to hold over the disputed lands on payment of the rents at the rates prevailing in the locality. That suit was dismissed by the Munsif, who held that the defendants had held the lands as tenants thereof and were not trespassers at all. On appeal the Subordinate Judge upheld the decision, holding that the defendants were holding over the lands with the permission of the plaintiff and were thus licensees in respect of the lands in suit. The status of the defendants was left undetermined. The judgment of the appellate Court is dated 11th July 1913. The present suit was brought soon after that, on 2nd March 1914, after giving notice to the defendants to quit the lands in suit. The lower appellate Court has held that the notice was served on 4th August 1913 and the present suit was filed on 2nd March 1914, that is after the expiry of six months of the term of the notice.

The defendants denied that the land was the zerait of the plaintiff and alleged that they were in possession of the same

by virtue of an oral agreement with the plaintiff after the expiry of the lease in 1314 F. S., on the condition of their paying the rents at the rates prevailing in the vicinity. The Munsif upheld the plea of the defendants and dismissed the suit of the plaintiff. On appeal the Subordinate Judge by his judgment, dated 27th August 1917, reversed the decision of the Munsif and decreed the suit of the plaintiff, holding that the defendants were tenants holding the lands from year to year and hence the tenancy was terminated by the service of notice to quit given to the defendants by the plaintiff. Aggrieved by the said decision the defendants appealed to this Court. The case was remanded to the lower appellate Court for determination of the following issues framed by this Court :

- "(1) Are the lands in suit zerait lands within the meaning of the Bengal Tenancy Act.
(2) Was the defendant holding under a lease for a term of years or under a lease from year to year?"

The Court below has now remitted its finding upon the aforesaid issues. As to issue 1 the Court below has held that the plaintiff failed to prove the lands in suit to be the zerait lands as defined in Ss. 166 and 120, Ben. Ten. Act. As to issue 2 the Court below, in agreement with the view taken by the appellate Court in Suit No. 730 of 1911 already referred to, has held that the defendants were holding over the lands as mere licensees. The finding has been made clear towards the end of the judgment, where it has been clearly held :

"that there was no formal agreement between the parties after the expiry of the lease in 1314 F. S., but that there might have been some talk about the renewal of the lease with respect to the disputed lands. There is nothing to show that the defendant got any extension of the lease. He was simply holding over the lands pending the completion of the negotiations with the tacit, if not express, permission of the plaintiff."

The Court has distinctly held that "the defendants were holding over from year to year." Under S. 51, Ben. Ten. Act, as well as under S. 116, T. P. Act, the defendants upon the aforesaid finding would be deemed to have been occupying the lands in dispute upon the same conditions as those contained in the original lease, by virtue of which they were admitted into the occupation of the lands in suit as part and parcel of the share of the plaintiff, leased to them in the village in question. S. 116, T. P. Act, says

that if a lessee remains in possession of the property leased to him after the termination of the lease and the lessor or his legal representative accepts rent from him or otherwise assents to his continuing in possession, in the absence of an agreement to the contrary, the lease shall be considered to have been renewed from year to year or from month to month according to the purpose of the property leased. S. 51, Ben. Ten. Act, embodies the principle of S. 116, T. P. Act. It is obvious that if a lessee holds over after the expiry of the term of his lease with the consent of the lessor, as in this case, he, the lessee, occupies the same character as he did under the expired lease. The status of the defendants in the present case is undisputed to be that of a tenure-holder as defined in S. 5, Ben. Ten. Act. The share in the village belonging to the plaintiff and formed into a separate patti was leased to the defendants for the purpose of collecting rents or bringing the lands under cultivation by establishing tenants thereon.

The land in suit was described in the lease as zerait. Whether the defendants are bound by the description, or whether the description would be accepted by a Court as conclusive evidence of the character of the land being zerait is immaterial. The description shows at least that the land was in direct possession of the landlord and it has been so recorded in the Survey Record of Rights in which the land has been described as bakasht, i. e., under the direct cultivation of the landlord. The defendants after the expiry of the term of the lease had no right to set up any title in these lands adverse to that of the lessor and in derogation of the rights of the latter. The defendants were fully cognizant of their own status. In Suit No. 730 of 1911 all that the plaintiff expressly claimed was that the land in suit was his zerait. The defendants did not controvert that statement and tacitly accepted in by alleging that they had acquired the right to hold over the land as tenants by virtue of an oral agreement after the expiry of the lease in question. If the defendants can prove that they held over the lands under the oral agreement set up by them the principle of holding over will not at all affect their title and their case will then come under the provisions of the Bengal Tenancy Act

governing the incident of a tenant, whether occupancy or non-occupancy. The finding of fact of the Court below has concluded this point.

It has been held that the oral agreement set up by the defendants has not been proved; all that has been proved is that the landlord consented to their remaining in possession of the lands during the pendency of the negotiations in respect of the disputed lands but that consent does not create a contract of tenancy. The consent was with the object of giving them the rights under S. 116 by holding over. Accepting the finding of the Court below we hold that the defendants were tenure-holders in respect of the lands in suit and were not raiyats within the definition of the term in the Ben. Ten Act. Therefore the contention of the learned vakil on behalf of the appellants that the suit of the plaintiff is barred by the provisions of S. 44, Bengal Tenancy Act, must fail. That section applies to non-occupancy raiyats, and the defendants not being such raiyats the section has no application to the present case. It is now unnecessary to consider the objections of the learned vakil appearing on behalf of the respondent as to the finding on issue 1, namely, that the lands in suit are not the zerait lands within the meaning of the Bengal Tenancy Act. It would be sufficient to mention that all the objections appear to have been disposed of by the Court below and that there is nothing to show that the view taken by the Court below is not correct. The plaintiff has not been able to prove within S. 120, Ben. Ten. Act, that the land in suit is the zerait land of the proprietor. No doubt the defendants ought to have denied the character of the land as zerait in their written statement in Suit No. 730 of 1911. But it is more than doubtful whether the scope of that suit was such as to make the omission of the defendants to make an express denial of the allegation of the plaintiff operate as *res judicata* on the question as to whether the land is the zerait of the malik.

The learned vakil on behalf of the appellants contends that the defendants cannot be ejected from the lands in question inasmuch as the notice served by the plaintiff was not sufficient in law. The lower appellate Court held in its judgment dated 27th August 1917, before the

case was remanded for further finding, that the notice was served upon the appellants on 4th August 1913, and the present suit was brought on 2nd March 1914, after the expiry of six months, the term of the notice, and hence the notice was sufficient and valid in law. The contention of the learned vakil is that the appellants were entitled to have six months' notice before the plaintiff could terminate the lease in question. This contention is based upon S. 106, T. P. Act.

In the first place it is doubtful if S. 106 applies to the land which was used by the plaintiff for agricultural purposes for S. 117, T. P. Act, exempts leases for agricultural purposes from the operation of Ch. 5, T. P. Act, in which S. 106 happens to be except in so far as the Local Government with the previous sanction of the Governor-General in Council may by notification published in the Local Official Gazette declare all or any of such provisions to be applicable in the case of all or any of agricultural leases. We have not been shown any notification issued by the Government under the latter part of S. 117 and hence S. 106 does not apply to agricultural leases. Assuming for the sake of argument that the section does apply to agricultural leases, the lease terminated in 1314 F. S. The defendants held over the lands with the consent of the landlord in the succeeding year during the pendency of negotiations for a lease of the share of the plaintiff in the village. The negotiations having fallen through, the plaintiff regarded the continuance of the possession of the defendants as that of a trespasser upon the lands and consequently brought Suit 730 of 1911 referred to above. In that case, as has already been observed, the defendants were held as having been allowed to continue to hold over the lands after the expiry of the lease as mere licensees. The plaintiff did not at all treat the defendants as tenants of the lands. The suit of 1911 is a clear notice of the intention of the plaintiff to evict the defendants from the lands in suit. No fresh tenancy having been created as held by the Court below, it would appear that no notice under S. 106 was at all necessary. This view has been taken in two cases, *Nandikolla Gopalan v. Man-yam Mahalakshami Amma Zemindarini*

Garu (1) and *Gokul v. Chand Shib Charan* (2). The facts of the latter appear to be very similar to those of the present one, where the defendant continued to hold over possession of the house after the expiration of the term of the lease in defiance of the authority of the lessor, and it was held that he was not entitled to a notice to quit under S. 106, T. P. Act. In the present case plaintiff gave a notice on 4th August 1913 (corresponding to 17th Srawan 1320) requiring the defendants to quit the lands by 1st Asin 1321. The suit was brought on 2nd March 1914. The defendants were therefore given sufficient notice in the present case. If the case is governed by the provisions of the Bengal Tenancy Act applicable to tenure-holders, no notice appears to have been prescribed by the said Act; much less a notice of six months, as the learned vakil on behalf of the appellants contends his clients were entitled to in this case. The contention is therefore overruled.

The result is that this appeal is dismissed with costs.

Foster, J.—I concur. In my opinion the defendant has been holding as a tenant of a tenure, as defined in S. 5, Ben. Ten. Act. My reasons are that in 1915 F. S. the two parties agreed to the defendant remaining on the land, he having hitherto held it as tenure-holder, and that they were contemplating a renewal of the tenure in respect of that very land. It is quite obvious that neither party contemplated a raiyati settlement. It also seems to me that the settlement was for that year only. There is nothing to show to the contrary, and the parties were expecting a renewal of the tenure. So even if it be considered a new settlement, as the appellant would have held it to be in 1315, it was only a new settlement for one year and it was a settlement of a tenure. That apparently was renewed with the tacit assent of the landlord year by year up to the year 1320. I gather this from the decision of suit No. 730 of 1911. But what has been the position since 1320? The defendant cannot say for a moment that he held over the land as a raiyat with the assent of the landlord in the years 1321, 1322 and the other succeeding years, year by year; for that is necessary to justify his

remaining on the land. If there is no landlord's assent, then the defendant has lost his status. Giving the very best position possible to the defendant, it could only be that of a tenant by sufferance, and that tenancy is terminable at the will of the landlord. I think that the notice issued in August 1913 was sufficient expression of the landlord's will to determine that tenancy. It is quite clear however from the record that the defendant has been holding the land against the wishes of the landlord; and his allegations, both that he has been given a raiyati settlement and that the landlord had assented to his possession of the land, are untrue and disingenuous.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 257

JWALA PRASAD, J.

Raghunath Kahar—Defendant — Appellant.

v.

Rama Rattan Pandey — Plaintiff — Respondent.

Appeal from Appellate Decree No. 1036 of 1917, Decided on 28th July 1919, from decision of Sub-Judge, Shahabad, D/- 30th May 1917.

(a) Civil P. C. (5 of 1908), S. 35 (2) — S. 35 (2) is not applicable when suit not decided on merits.

Section 35 (2) does not apply where a suit is disposed of without adjudication upon the merits. [P 258 C 2]

(b) Civil P. C. (5 of 1908), S. 35—No decision on merits — Only question being as to costs incurred—Court is to decide it on certain principles — Appeal and second appeal lies.

Where there is no decision in a suit upon the merits of the case and the question to be decided by the trying Court relates only to the costs incurred in the suit, the Court, in deciding the matter as to costs, exercises a judicial discretion based upon certain principles and, as such, its order is appealable. Similarly, as the order of the Court of Appeal as to costs involves matters of principle, it is subject to second appeal. [P 258 C 2]

N. C. Roy, Ragho Pershad and Shiveswar Dayal—for Appellant.

Parmeshwar Dayal, Harnandan Sahay and Jadubans Sahay — for Respondent.

Judgment.—This appeal comes before us from the decision of the Subordinate Judge of Shahabad, dated 30th May 1917, and relates to a very small sum of costs awarded to the plaintiff in respect of a suit brought by the latter in the Court of the Munsif of Arrah on 27th March 1916.

(1) [1910] 7 I. C. 8.

(2) [1912] 13 I. C. 59.

In that suit the plaintiff claimed a declaration that a moiety of a house attached in execution of a decree, which had been obtained by defendant 1 against defendant 2 and advertised for sale, belonged to him and that the same was not liable for the decree of defendant 1. Ex. A, an order sheet of Execution Case No. 181 of 1915, shows that the house in question was advertised for sale to be held on 3rd April 1916. After filing the suit the plaintiff obtained an order from the Court on 4th April directing the other half of the property, which was not claimed by the plaintiff, to be sold first and accordingly half the share in the house belonged to defendant 2 was sold on 6th April 1916 and fetched a value which entirely satisfied the decree of defendant 1. There was therefore no necessity of selling the share claimed by the plaintiff in the suit. Accordingly, on 27th April, defendant 1 filed a written statement stating that at that time no decree was under execution and that the property in suit, namely, half the house, was not at all advertised for sale in execution of any decree and hence the plaintiff's suit was premature and ought to be dismissed. The case was adjourned to 6th May for the plaintiff to prove service of summons upon defendant 2.

On 6th May defendant 2 took time to file a written statement but did not do so, nor did he since then appear in the suit. The following issues were framed for trial as between the plaintiff and defendant 1 : (1) Has there been any attachment of the plaintiff's share in Execution Case No. 181 of 1916 ? If so, has the plaintiff any valid cause of action to bring the suit ? (2) Is the suit premature ? (3) To what relief, if any, is the plaintiff entitled ? But when the case was ultimately taken up on 2nd January 1917, the Court discovered that there was no necessity of trying any of the aforesaid issues framed in the case, inasmuch as the share claimed by the plaintiff was not sold at all and the decree of defendant 1 was long before satisfied by the sale of the property of defendant 2 in Execution Case No. 181. The Court therefore went into the question of costs only, as to which it held that

"this question should have been decided long ago had not the plaintiff taken several adjournments; and so a good many unnecessary costs could have been avoided. The plaintiff could have besides had this sale stayed by the simpler process

of filing a claim in the execution case instead of filing a regular suit, and could have got this remedy by spending only a rupee if he liked. Hence I think that the plaintiff is not entitled to the full-court-fees he has spent as he did not try for the simpler procedure at first. In all fairness I think further that it will serve the ends of justice fully if we set off the costs of the defendant as awarded on 28th July 1916 with the costs of the plaintiff and hold that the two have been satisfied by being thus set off. If the plaintiff was harassed by the first attachment, the defendant too has been sufficiently harassed in return by the adjournments and subsequent delays caused by the plaintiff."

As the costs of both the parties were as above indicated, set off one against the other, no decree for costs was prepared by the Munsif. Against this order of the Munsif the plaintiff appealed to the District Judge and the appeal was ultimately heard by Mr. Abdul Jabbar, Subordinate Judge. By his decision of 30th May the Subordinate Judge upset the order of the Munsif and held that the plaintiff was entitled to costs incurred by him in both the Courts, except that he should get pleader's fee as in an ex parte suit. Defendant 1 has therefore appealed to this Court.

A preliminary objection was taken on behalf of the plaintiff-respondent that no second appeal lay to this Court against the order of the lower appellate Court. Reference has been made to S. 35, Civil P. C., in support of this contention. That section gives full discretion to the Court in the matter of awarding costs in a suit. That discretion was exercised by the Munsif, who had the seisin of the case, in favour of the appellant, and if the contention of the respondent were good his appeal to the Court below was incompetent. The respondent cannot also rely upon Cl. (2), S. 35, which embodies the principle that a successful litigant is entitled to his costs, inasmuch as the suit was "disposed of without adjudicating upon the merits," as neither party pressed for that before the Munsif. There was no decision in the suit upon the merits of the case and the question to be decided by the trying Court related only to the costs incurred in the suit. The Court in determining the costs had to exercise the judicial discretion based upon certain principles and as such the order of the Munsif was appealable to the lower appellate Court. Similarly, the order of the latter as to costs involves matters of principle and as such is subject to second appeal to this Court. This

contention of the respondent is therefore overruled.

I agree with the Court below that defendant 1 having attached the entire house, it was open to the plaintiff to bring the suit to have it declared that half the share in the house belonged to him and was in his possession and that the same was not liable to be attached or sold in execution of the decree of defendant 1 against defendant 2. Defendant 1 was therefore liable to the costs incurred by the plaintiff in instituting the suit. The plaintiff obtained an order on 4th April that the share of defendant 2 in the moiety of the house should be sold first and that on 6th April that share, being sold, fetched a price whereby the entire decree was satisfied and the sale was confirmed on 10th June. Defendant 1 in the written statement of 27th April clearly stated that the decretal amount was realized by the auction-sale of half the share of the disputed property and that there was no necessity for the determination of the plaintiff's right. The issues in the case did not at all question the right of the plaintiff in the house, and the only question raised was whether the plaintiff had any cause of action on account of the result of the Execution Case No. 181 of 1916. It is therefore inconceivable why after this the plaintiff persisted in going to the trial of the case and not withdrawing from the suit. He went to the length of applying to the District Judge for the transfer of the case from the file of the Munsif and thus delayed the disposal of it, and when the case came back from the District Judge, the plaintiff went on taking adjournment after adjournment although the defendant was ready, and the Munsif was perfectly right in holding that the question as to the costs could have been determined long before if the plaintiff had not taken these adjournments.

The plaintiff is therefore responsible for the delay in the disposal of the case and he is thus not entitled to any costs subsequent to the filing of the written statement by the defendant. I may go further and hold that the Court itself ought to have disposed of the case at the time when the issues were framed in the case, inasmuch as it was clear to the Court at that time that the decree of defendant 1 was satisfied and that the cause of action ceased to exist, particularly so

when both the present title Suit No. 67 and the Execution Case No 181 were going on simultaneously in the very Court and the same Munsif by his order of 4th April directed that the plaintiff's share was not to be sold in the first instance and on that very day sold the other half of the property whereby the entire decree was satisfied. At least at the time when the issues were framed the Court was cognizant of the facts of both the cases and ought to have decided the title suit without so many adjournments extending over eight months. The adjournments appear to have been made automatically and the Munsif does not appear to have exercised his mind as to their reasonableness. The matter involved in this case is in itself not of great value, but is a sample of the procedure that is adopted by the Courts below in adjourning cases as a matter of course from month to month without looking into the requirements of the cases and the possibility of their being disposed of on the dates fixed for their hearing. Much of the harassment to the parties and the costs incurred in the case could have been saved if the Munsif were alive to what he was doing.

Now, whether the delay in the disposal of the case was due to the indifference of the Court or to the laches of the plaintiff, it is certain that the defendant is not liable for the costs incurred by the plaintiff on the adjourned dates, for he (the defendant) was ready on all the dates. The plaintiff is therefore entitled to the costs of the suit incurred by him up to the time the issues were framed. Out of the costs thus incurred Rs. 6, which was due to defendant 1 from the plaintiff as costs of adjournment awarded by the Court to the latter by its order of 28th July 1916, should be deducted. The plaintiff will be entitled to the balance of the costs incurred in the first Court and the decree of the Munsif is therefore varied accordingly. The plaintiff was therefore entitled to prefer an appeal to the lower appellate Court for recovery of the balance and the costs of the lower appellate Court will be assessed upon the sum that the plaintiff was entitled to get in the Munsif's Court. The decree of the lower appellate Court is also varied to that extent.

The appeal partially succeeds in this Court. Each party will therefore bear

the costs of this appeal in proportion of its costs. A decree will be prepared by this Court incorporating the costs of both the Courts below according to the afore-said directions.

V.S./R.K. *Appeal partly accepted.*

****A. I. R. 1919 Patna 260**

Full Bench

DAWSON-MILLER, C. J., ATKINSON AND ADAMI, JJ.

Bhikanpur Sugar Concern, In the matter of.

Civil Misc. Judicial Case No. 74 of 1919, Decided on 14th August 1919, by the Offg. Member of the Board of Revenue, Berar.

****Income-tax Act (7 of 1918), Ss. 2(1) (b) and 4—Income from manufacture of sugar made from sugarcane grown in land is not exempt as agricultural income.**

The profits derived by a factory from the sale of a finished product, such as sugar, manufactured at the factory from the raw material grown by its servants on its own land is not exempt from the payment of income tax, as the income so derived is not agricultural income within the meaning of S. 2 (1) (b) [P 261 C 2; P 262 C 1; P 263 C 2 & P 265 C 1]

P. Kennedy and S. C. Mitter—for Objectors.

Advocate-General, Bengal, and Govt. Advocate, Bihar and Orissa—for the Crown.

Dawson-Miller, C. J.—This case has been referred to the High Court by the Member of the Board of Revenue of this Province under the provisions of S. 51, Income-tax Act, 1918. The reference was made in the course of proceedings under the Act relating to the assessment to income tax of the Bhikanpur Sugar Concern. The question upon which the opinion of the High Court is sought is whether the Bhikanpur Sugar Concern is liable to pay income-tax in respect of that portion of its profits derived from the sale of the finished article in so far as it is manufactured from sugarcane grown by its own servants on its own land, or whether it is exempted on the ground that such income is "agricultural income" within the meaning of Ss. 2 and 4 of the Act. By S. 4 income of this nature is not chargeable to income-tax. By S. 2 agricultural income is defined. By clause (1) (b) of that section agricultural income includes any income derived from (i) agriculture, or (ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver

of rent-in-kind to render the produce raised or received by him fit to be taken to market.

It is contended on behalf of the factory that the income derived from the sale of the finished product manufactured by them at their factory from the raw material grown upon their own land is covered by the words of S. 2 (1) (b) which I have just quoted. In order to determine this question it is necessary to consider the circumstances under which the factory carries on its business. It is owned by a private company, the business being conducted under the direction of a manager who is also a shareholder in the company. It owns a sugar factory equipped with modern machinery by which the sugarcane is converted into refined sugar ready for domestic purposes. It carries on business on a large scale. During the year of assessment 744,398 maunds of sugarcane, of which rather more than half was grown on the factory's own land passed through the mills, the remainder being purchased from cultivators of sugarcane in the neighbourhood. The gross proceeds of this sugarcane amounted to nearly 6 lakhs of rupees and that of molasses for the same period to about Rs. 44,000. The net profits for the year were stated to be Rs. 1,75,000, on which income-tax has been assessed at Rs. 10,937. The factory has lodged an objection in respect of Rs. 7,804 of this assessment as representing a tax on the profits derived from sugarcane grown by themselves. From the accounts it appears that the agricultural branch which deals with the cultivation of the raw material and the factory branch are kept separate. It is not stated what the profits of the agricultural branch are, but these would appear to be exempt from taxation. The process of manufacture adopted by the factory is similar to that employed by other sugar refineries in other parts of the world.

The main question for determination is whether the process of manufacture carried on by the company can be said to be the performance by a cultivator of any process ordinarily employed by a cultivator to render the produce raised fit to be taken to market. In order to determine this it is necessary to inquire as to what are processes ordinarily employed by cultivators of sugarcane. It

is common ground that the vast bulk of the sugarcane in this country is cultivated by raiyats of agricultural villages. This they either sell in a raw state to middlemen or owners of factories or country mills, or they reduce it by certain simple processes of crushing and boiling to a substance known as *rab*, a kind of molasses in a crude state, and then sell it to the factories where it is subjected to a further process of refinement in order to make it fit for domestic use as sugar. It is also not disputed that a very small fraction of the sugarcane produced in the country is grown by the owners of factories themselves. The facts of which I have given a short summary are more fully referred to in the order of reference of Mr. McPherson, the Officiating Member of the Board of Revenue, but I have stated enough to show that the processes employed by the factory are in kind as well as in degree vastly different from those ordinarily employed by a cultivator in order to render the produce fit for the market. Indeed the market to which the cultivator ordinarily takes his wares is not the same market as that in which the refined sugar manufactured by the factory is sold. The market of the vast majority of cultivators of sugarcane is the sugar refinery itself or the country mill. The market of the sugar factory is the retail dealer of the finished product fit for domestic use, and in my opinion it is not possible to hold that the processes employed by a sugar factory in order to render it fit for their customers are those ordinarily employed by a cultivator to render it fit for his. It is true that the cultivator in some cases subjects the raw material to certain manufacturing processes resulting in the production of the juice or *rab* before disposing of it to his customers, but even assuming that the performance of these processes by the cultivator would come within the meaning of S. 2 (1) (b) (ii), the matter so far as he is concerned stops there, and a great deal more has to be done by the factories to refine and crystallise the product before it is fit for the market with which they deal.

It was contended on behalf of the objector that the words "process ordinarily employed" have reference to the processes ordinarily employed by sugar factories or anyone else, if they happen to

be cultivators, in rendering the produce fit for the market and that if a person is a cultivator and employs such processes in the ordinary course of his business, he comes within the exemption created by the section. I do not think the section can be read in this sense. It refers to the performance by a cultivator of a process ordinarily employed by a cultivator, which I think means in ordinary use amongst cultivators and not to a process ordinarily employed by anybody else, and had the meaning been that contended for, it is difficult to see what operation can be given to the words 'by a cultivator or receiver of rent in kind'.

It is next contended that as this is a taxing statute, it should be strictly construed in favour of the subject, and if there is any ambiguity in the meaning he should be allowed the benefit of the doubt. I do not think the construction of the section gives rise to any difficulty. The real question for determination is one of fact, viz. whether the process employed by the factory is that in ordinary use by cultivators, and in my opinion the evidence shows that it is clearly not. It is further contended that the history of the assessment to taxation of the income of the Bhikanpur Factory throws some light upon the intention of the Legislature. In 1912 the Commissioner of Tirhut on an objection by the factory exempted them from assessment on the profits of their home-grown produce, his decision being based upon an opinion expressed by Sir G. C. Paul, Advocate-General of Bengal, in the year 1886 relating to the assessment of indigo and tea concerns. We have no information as to the processes adopted by indigo or tea planters and are unable to judge how far that opinion may be relevant to the facts of the present case, but it is contended that notwithstanding the decision of the Commissioner of Tirhut the legislature in passing the Act of 1918 re-enacted in S. 2 the provisions of the previous Acts in practically identical language and must therefore be taken to have concurred in the interpretation placed upon the Act by the Commissioner of Tirhut in 1912. It appears however that in 1914 the Board of Revenue were not satisfied with this decision and placed the matter before the Local Government and finally before the Government of India, with the

result that the Bhikanpur Factory was assessed on the whole of its profits for the year 1916-17. This assessment has been paid under protest and a suit is still pending in connexion with it, which it has been agreed shall abide the result of the present reference. I agree where there has been a long course of decisions determining the construction of a statute, this may be taken into consideration in construing a new enactment passed in the same terms as pre-existing statutes, but a single decision such as that referred to cannot, in my opinion, form the basis of any presumption as to the intention of the legislature in the present case. Moreover, as is pointed out by Mr. McPherson in the order of reference the word "factory," which appears in the proviso to sub-Cl. (c), S. 5 of the old Act, has been omitted from S. 2 (1) (b) (iv) of the present Act "presumably lest its presence might lend colour to any claim of the nature now under consideration."

It is further contended that the factory was never taxed before the year 1916-17 and for many years they have made an income from sugar. There is however no evidence on the record to show how long the manufacture of sugar by this factory has been going on. We are told that it turned its attention to sugar in the year 1906, as did also many indigo planters at a time when the synthetic process of indigo manufacture in Europe materially interfered with the business of indigo planters in this country. What the process of manufacture adopted by the Bhikanpur Factory at that time was we do not know, but in any case I do not think the fact that it has escaped taxation in the past is in itself a good reason why it should still escape, unless it is in fact exempted by the Income-tax Act itself. In my opinion they are not exempted under the clauses of the Act relied on for the reasons above given, and I would answer in the affirmative the question submitted to us whether the Bhikanpur Concern is liable to income tax in respect to that portion of its produce which is derived from sugarcane grown by its servants on its own land, and in the negative the question whether it is exempted by reason of the provisions contained in S. 2 (1) (b) (ii) of the Act.

A further point was taken by the learned Advocate-General on behalf of the Board of Revenue, viz. that

a company in the position of the Bhikanpur Concern cannot be said to be a cultivator within the meaning of S. 2 of the Act. He pointed out that the company really consisted of two distinct entities, one interested only in the production of sugarcane and the other in the manufacture of refined sugar, and the accounts show that the factory branch really bought from the agricultural branch the raw sugarcane at a fixed valuation of 7 annas per maund, which was credited to the agricultural branch in the factory accounts, and that in such circumstances the cultivation of the raw material was only ancillary to the manufacture of the finished product, whereas in the case of a cultivator contemplated by the Act the process of manufacture, such as it is, is merely ancillary to the cultivation of the raw produce in order to make it fit for the market.

In support of this contention the case of the *Stamp Reference* (1) was relied upon. That case dealt with the meaning of the term cultivator in Sch. 2, Stamp Act, 1879, and held that it did not include farmers, middlemen or lessees even though cultivation was to some extent carried on by them in the area covered by their lease but included only those persons who actually cultivated the soil themselves or by members of their household or by hired labour and with their own or hired stock. The question in that case was whether a kabuliyat executed by a lessee of certain land, the greater portion of which was not cultivable or susceptible of being treated as a cultivator's holding, was exempted from stamp duty under the Act of 1879. The Court found that although some small portion of the land might have been brought under cultivation by the lessee, he was not a cultivator within the meaning of the Act, having regard to the purposes for which the land was held. That case does not in my opinion support the contention of the learned Advocate-General in the present case.

Having regard to the purposes for which the company's land was used and the fact that they did cultivate it for their own purposes by their own servants, I think they must be held to be cultivators within the ordinary meaning of that term. But in so far as they were carrying on a business of sugar manufac-

(1) [1883] 5 All. 350.

turers, I do not think that the processes used by them for that purpose were those ordinarily employed by cultivators for the purpose of rendering the produce fit to be taken to market. The truth is, in my opinion, that the Bhikanpur Concern was really acting in a dual capacity. In so far as they were cultivators of sugarcane, their operations ceased when they handed over the raw material to their factory branch. In so far as they were manufacturers of refined sugar, they were carrying on a business which required the adoption of manufacturing process not ordinarily used by cultivators before disposing of their produce in the market. In fact there is no evidence to show that any other sugar factories of this nature convert into refined sugar produce grown on their own farms; but even assuming that there may be a few isolated instances in which this is done it cannot in my opinion be said that this process of manufacture is one ordinarily employed by a cultivator.

Atkinson, J.—I concur in the judgment just delivered by the learned Chief Justice. I desire however to add a few observations of my own. The question for decision is whether the Bhikanpur Sugar Concern is exempt from liability to income-tax under the provisions of S. 4, read with S. 2, Cl. (b) (ii), Income-tax Act (7 of 1918). Before we consider the construction of S. 2 (b) (ii) with a view of imposing liability on the Bhikanpur Sugar Company for the payment of income-tax, it is necessary to ascertain two facts. First, is the Bhikanpur Sugar Concern a cultivator of land? And secondly, is the process which the sugar company employ in the manufacture of sugar process ordinarily employed by a cultivator in order to render the produce raised by him fit to be taken to the market? The Bhikanpur Concern is a private company carrying on two separate and different classes and kinds of business. The company carry on an agricultural business in respect of large areas of land which they hold as mukarraridars, and secondly, the company also carry on a very large and extensive business in the manufacture and refining of sugar for sale to consumers generally. The respective branches of the company's business are independent of each other and are presumably worked and managed by independent staffs. In the reference the

position of the Bhikanpur Company with regard to its different businesses is stated to be as follows :

"The Concern is divided into two branches: an agricultural branch, which deals with the cultivation and purchase of the cane; and a factory branch, which is concerned solely with the manufacture of sugar."

The sugar business of the company is managed by a European manager; and for the purpose of carrying on the business of the sugar factory, the company buy sugarcane from ordinary raiyats and cultivators at the price of four annas per maund; and in addition to the purchases of sugarcane made by the company from raiyats, the sugar factory also buys from its agricultural branch such sugarcane as that branch produces from the land under its cultivation. The Board of Revenue found in the reference that the cane which is purchased by the company from cultivators is purchased at the rate of four annas per maund, and the cane grown by the Bhikanpur Company itself in the course of its agricultural business is transferred from the agricultural branch to the factory branch at a uniform valuation of seven annas per maund; and it is further stated in the reference that the amount of sugarcane purchased by the sugar factory from the Bhikanpur agricultural undertaking is debited in the books of the sugar factory in favour of its agricultural branch. Thus the position seems to be that the sugar factory purchases from its agricultural branch the sugarcane produced by it at a price higher than the ordinary market price payable for sugarcane to the ordinary cultivating raiyat. This being the situation, in my opinion the sugar factory cannot be said to be the cultivators of the sugarcane produced by the agricultural branch of its business. The sugar factory in my view is in the position of an ordinary purchaser from its agricultural branch business, just in the same way as the sugar factory purchases sugarcane from individual cultivators.

They (the sugar factory) convert the product of the agricultural business into stock, suitable and convenient for the carrying on of their manufacture of sugar referable to that portion of their business connected with the sugar factory. I hold therefore that the sugar factory as such is not a cultivator within the meaning of S. 2 (b) (ii), Income-tax Act; and

consequently that the Bhikanpur Sugar Factory is not within the class of persons contemplated as entitled to exemption from liability to pay income-tax under the Income-tax Act, 1918. Assuming however that the Bhikanpur Sugar Factory is a cultivator within the provisions of the Income-tax Act, the next question that requires to be considered is, does the company in respect of the sugarcane which it raises or produces as part of its agricultural business submit the produce so raised by them to a process ordinarily employed by cultivators generally to render such produce fit to be taken to the market? In other words the question is whether the operations of the sugar factory can reasonably be described as a process ordinarily employed by a cultivator to render his produce fit to be taken to market.

The Bhikanpur Company is an industrial trading concern enjoying a large and extensive business in the manufacture and refining of sugar; and it purports to buy raw material in its raw condition or in a crude state, and convert it into the refined and finished article for human consumption in the market of the consumer; and for the purpose of its business the sugar factory has erected costly machinery of the most improved and scientific character in order to produce the most finished article in the shape of sugar fit in its condition, as it leaves the factory, to be used for all domestic purposes. Having considered the evidence in the case, I am satisfied that the process employed by the sugar factory in the manufacture of sugar is not that ordinarily employed by a cultivator in rendering the sugarcane produced by him fit to be taken to the market and in my opinion the argument addressed to us by Mr. Kennedy begs the whole question when he contends that because the sugar factory has to treat the sugarcane in a certain way in its initial stages in order to render the raw material fit for more perfect manufacture as a finished article, that such process as is employed in the operations of the factory in the manufacture of sugar runs on parallel lines with the methods ordinarily adopted by a cultivator in rendering the produce of the sugarcane produced by him fit to be taken to the market.

Holding as I do that these two questions which I have mentioned should be

answered in the negative *qua* the rights of the Bhikanpur Sugar Company there is an end of this reference; and there is no necessity to apply one's mind to a minute consideration of the provisions of S. 2 (b) (ii). However, I would like to add two observations with regard to the construction of that section. In my opinion the process ordinarily employed produced by a cultivator in rendering the produce by him, so far as sugarcane is concerned for the purpose of rendering it fit to be taken to the market is the more crude and primitive method or process referred to in the deposition of Abilak Dhobi, Annexure G, which is the process ordinarily adopted by a cultivator in preparing the raw sugarcane for purchase by the manufacturer or the millowner, as the case may be; and therefore I am of opinion that the market contemplated in S. 2 (b) (ii) is the market available to the producer as such and not the market for which the sugar factory cater, viz., the market of the retailer or consumer.

Section 4 read with S. 2, Income-tax Act of 1918, is in my opinion a section designed to protect the producer, by giving to him exemption from liability from income-tax, as a bona fide agriculturist carrying on the business of a farmer in the ordinary course of good husbandry. For these reasons I respectfully concur in the judgment of the Chief Justice, and think that the answer to the reference should be that the decision arrived at by the Board of Revenue is right, and that the Bhikanpur Sugar Company are not entitled to the exemption which they claim under the Income-tax Act of 1918.

Adami, J.—The circumstances leading up to this reference have been fully stated by the learned Chief Justice. The question referred to us is whether a company owning a sugar factory equipped with up to date machinery and manufacturing sugar for the consumption of the public, can claim exemption from the payment of tax on so much of its income as is derived from the sale of refined sugar manufactured from sugarcane grown on lands belonging to the company and cultivated by its own servants, whether in fact such income is "agricultural income" within the meaning of S. 2, sub S. (1), Cl. (b) (ii), Income-tax Act, 1918, and is therefore exempted from tax under S. 4 of the Act. Under S. 2 (1) (b) (ii) of the Act,

"agricultural income" includes income derived from

"the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver, of rent in kind to render the produce raised or received by him fit to be taken to market."

We have then to determine what process is ordinarily employed by cultivators or receivers of rent-in-kind to render the sugarcane raised or received by them fit to be taken to market, and whether the Bhikanpur Sugar Factory, assuming it to be a cultivator so far as sugarcane grown by it is concerned, is in fact able by a like process to convert the raw material into a substance fit for the market on which the concern depends for its profit and to which it ordinarily resorts. The affidavit, Annexure G, to the reference shows that the ordinary cultivator of sugarcane cuts and strips his cane, crushes it in a kolhu with the help of two bullocks and extracts the juice, which is run into an earthen vessel. The juice is strained through a piece of cloth and then removed to an iron pan wherein it is boiled slowly until it becomes *rab*. The *rab* is then sold by the cultivator to sugar refiners for the manufacture of sugar. Instead of converting the juice into *rab*, cultivators will often boil and re-boil the juice until it becomes a thick jelly, which is then converted into *gur* or molasses and is used in the cultivator's own house or is sold for domestic use as *gur* in the local market.

The next class are the Indian manufacturers of sugar on a small scale as described in Appendix F to the reference. They chiefly buy cane from cultivators in the locality and, by stripping and crushing, boiling and straining, make *gur* cakes which are soaked in water. This substance is boiled and strained and then stored in tanks covered with simar (tank weed) which causes the molasses to drain away and leave coarse white sugar which is then, after being broken up, fit to be taken to the market to be sold. The next superior class described in Annexure H are the Indian sugar refiners, who buy *rab* from the cultivators and grow no cane themselves. They place the *rab* in pans and boil and strain and reboil it allowing it to thicken. It is then covered with simar which makes the molasses trickle off and sugar remains. These men are not cultivators, but they form the market to which the cultivators take the

rab they have made from the cane grown by them.

In the processes followed by these three classes no machinery is used other than the kolu (wooden crusher) or the Behea Mill, both of which are worked by bullocks. Lastly we come to the sugar factory such as the Bhikanpur concern. There the process up to the stage of the extraction of the juice is similar to that followed by the ordinary cultivator and small Indian manufacturer, only instead of bullocks machinery is used for crushing and the arrangements are more elaborate. A much more scientific process however is followed in treating the juice; various retorts, defecators, eliminators, settling pans triple effect boilers, and centrifugals are used for converting the juice into *rab* and the *rab* into sugar. The crushing, heating and evaporating are done by machinery and steam. The process followed by the factory, as far as the stage of conversion into *rab*, is in its essentials the same as that followed by the cultivator, though far more elaborate; but for the cultivator the conversion of the juice into *rab* is the end of the process. He has then performed the process which has made the sugarcane fit to be taken to his market, and his market is to be found in the smaller sugar refineries or larger sugar factories; otherwise if he does not trouble to perform any process at all he sells the cane he has grown to a factory or to an Indian refiner who extracts sugar from the cane on a small scale as shown in annexure F. The cultivator then renders the produce of his sugarcane crop fit for the market in which he is to sell it either by merely cutting it or by converting it crudely into *rab*, and the market he sells it in is the market in which the manufacturers and refiners of sugar are purchasers. On the other hand the object and sole business of the sugar factory is to produce refined sugar.

It has no sale for *rab*, but instead may purchase it. It finds its market among the general consumers of sugar and the grocers who sell it to the public. Assuming that the concern, by reason of its growing its own sugarcane on its own lands, is a cultivator for the purposes of S. 2 of the Act, it cannot be held that the process performed by it in order to render that sugarcane fit to be taken to the market, which it is the object of its busi-

ness to command, namely, the sugarmarket, is a process ordinarily employed by a cultivator who merely converts sugarcane into *rab* to be sold to manufacturers or refiners. Were we to decide otherwise, and follow the contention of the Bhikanpur concern to the logical conclusion, we would have to admit that a firm carrying on the business of the manufacture of confectionery which, for the purpose of that business, grew its own cane and refined its own sugar, could claim to be exempted from tax on the income it derived from the sale of the confectionery. It is not necessary to dispute the assertion in the affidavit that the process performed in the Bhikanpur Factory is the same as that performed in all sugar factories in India and the world. The point is that the processes performed by the factory to render the sugarcane fit to be taken to its market are not the same as those ordinarily employed by a cultivator to render the sugarcane he has grown fit to be taken to the market in which he can find a sale. The factory cannot claim that, because up to the preliminary stage of conversion of sugarcane into *rab* the process performed by it is essentially the same as that ordinarily employed by a cultivator who sells his *rab* to the refiners and manufacturers, therefore the whole process, which produces the refined sugar ready for the consumer by the treatment of the *rab* by elaborate machinery, is the process ordinarily employed by the cultivator. The produce of the factory's cultivation may be the same and the preliminary stage of manufacture may be the same as in the case of a cultivator, but the final produce of the process is not the same and the market is altogether different. I agree with the learned Chief Justice that S. 2 (1) (b) (ii), read with S. 4, Income Tax Act, does not apply to the case of a sugar factory of the nature of the Bhikanpur firm, even though a moiety or more of the sugar manufactured is the product of sugarcane grown on its own lands by its own servants.

V.S./R.K.

Answer accordingly.

* A. I. R. 1919 Patna 266

JWALA PRASAD, J.

Sakhi Rai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 57 of 1918, Decided on 27th February 1918, from decision of Subdivl. Officer, Shahabad.

* Criminal P. C. (1898), S. 476 — Enquiry under S. 476 conducted by Magistrate other than Magistrate taking cognizance of case is not judicial proceeding and person giving evidence in such enquiry cannot be prosecuted for perjury—Penal Code (1860), S. 193.

A Subdivisional Officer called upon the complainant in a case pending before him to show cause why he should not be prosecuted for an offence under S. 211, Penal Code, and on the complainant showing cause sent the case to an Honorary Magistrate for recording evidence. The latter recorded the evidence and sent the case back to the Subdivisional Officer. On receipt of the record the Subdivisional Officer directed the prosecution of the petitioner, who was a witness for the complainant, for perjury in respect of a statement made by the petitioner before the Honorary Magistrate:

Held: (1) that the preliminary enquiry required to be held under S. 476, Criminal P. C., could not be directed to be held by any other Magistrate except the Subdivisional Officer himself who thought that the case of the complainant was a false one and gave him a chance to show cause: (2) that the Honorary Magistrate had therefore no jurisdiction to record the evidence of the petitioner and that the petitioner therefore did not give false evidence at any stage of a judicial proceeding within the meaning of S. 193, Penal Code and could not be prosecuted for perjury.

[P 267 C 2]

P. E. Lall and *C. N. Agarwalla*—for Petitioner.

Judgment. — This is an application against an order of the Subdivisional Officer of Shahabad directing the prosecution of the petitioner under S. 476, Criminal P. C., for an offence under S. 193, I. P. C. The facts appear to be as follows: One Angrahit Roy lodged an information before the police against Deonarain Dusadh and others under Ss. 147, 379 and 225, I. P. C., on 16th September 1917. On 22nd September 1917 the complainant lodged a complaint before the Subdivisional Officer, who after examining him on oath ordered the complaint to be put up with the police report. On 25th September the Subdivisional Officer passed the following order:

"Call on the complainant to show cause why he should not be prosecuted under S. 211; I.P.C., and fix 5th October 1917."

On 4th October 1917 the complainant showed cause by a petition asserting that his case was true and that he was ready

to prove his case by evidence. On 5th October 1917 the Subdivisional Officer passed the following order:

"To Moulvi Badruddin Choudhuri for favour of recording evidence. Court Sub-Inspector will cross-examine the witnesses in the light of police report."

The petitioner Sakhi Rai was examined by the complainant as a witness in the Court of Moulvi Badruddin Choudhuri and made the following statements:

(a) The police officer did not go to the village. (b) I did not accompany the complainant when he went to the thana for lodging information. (c) I was not examined by the Sub-Inspector. (d) I was once fined Rs. 200, the decision was upset in appeal.

On 6th October 1917 the evidence was placed before the Subdivisional Officer, but the Court Sub-Inspector filed a petition for the examination of two Sub-Inspectors and called for the criminal file register for 1915 in order to prove the falsity of the statements of the aforesaid witness. On 16th October 1917 the Subdivisional Officer passed the following order: "To Mr. Haider for favour of recording evidence." Mr. Haider examined one witness and the case was then put up before the Subdivisional Officer on that very day. The Subdivisional Officer then made the following order: "Call the Sub-Inspector Muhammad Raza on 3rd November 1917." On that day Mr. Kaviraj, another Magistrate, was asked by the Subdivisional Officer to examine the Sub-Inspector Muhammad Raza, who after examining him submitted the record to the Subdivisional Officer again.

On 5th November 1917 the Subdivisional Officer on a scrutiny of the evidence of the witnesses examined by the several Magistrates disbelieved the complainant's witnesses and dismissed the complaint under S. 203, Criminal P. C. He also held that there was no sufficient evidence for prosecuting the complainant under S. 211 and accepted the cause shown by him. He however drew up proceedings against the petitioner for his prosecution under S. 193, I. P. C., apparently because his statement quoted above, recorded by Moulvi Choudhuri Badruddin, was in conflict with the evidence of the Sub-Inspector recorded by

other Magistrates. The petitioner's statements were recorded by Moulvi Choudhuri Badruddin in pursuance of an order of the Subdivisional Officer of 5th October 1917. Moulvi Choudhuri Badruddin was not directed by this order to make any local inspection or any enquiry and it could not be an order under S. 202, Criminal P. C., which requires that the Magistrate taking cognizance of an offence may, for reasons to be recorded by him, postpone the issue of process against the accused and either enquire into the case himself or direct a previous local inspection to be made by any officer subordinate to such Magistrate: vide *Hari Charan Gorai v. Siris Chandra Sadhukhan* (1). The direction to Moulvi Badruddin Choudhuri was not made in terms of the section. There is no other section in the Code of Criminal Procedure under which the direction was given to Moulvi Badruddin Choudhuri to record the evidence of this witness. The same remark applies to the orders of the Subdivisional Officer directing the evidence of the two Sub-Inspectors as witnesses to be recorded by Messrs. Haider and Kaviraj.

The complainant in the case was called upon to show cause why he should not be prosecuted under S. 21, I. P. C. This was obviously upon the police report which recommended the prosecution of the complainant for instituting a false case. The Magistrate took cognizance of the offence committed by the complainant under S. 211, I. P. C. S. 476, Criminal P. C., is the only section under which the complainant could be called upon to show cause why he should not be prosecuted. The preliminary enquiry to be held under S. 476 could not be directed to be held by any other Magistrate except the Subdivisional Officer himself, who on the police report thought that the case of the complainant was a false one and gave him a chance to show cause. From this point of view also the Honorary Magistrate Moulvi Badruddin Choudhuri had no jurisdiction to record the evidence of the petitioner in respect of which he is directed to be prosecuted. The petitioner therefore did not give "false evidence at any stage of a judicial proceeding," as is required by S. 193, I. P. C. The order of the Subdivisional Officer directing the prosecution of the petitioner under S. 193, I. P. C., appears

(1) [1910] 7 I. C. 747.

to be without any jurisdiction. In *Haibat Khan v. Emperor* (2) it was held:

"that the District Magistrate before whom the police reported the case to be false could not make an order directing the prosecution of the complainant under S. 211 upon an enquiry held by a Subordinate Magistrate, inasmuch as the District Magistrate did not obtain knowledge of the falsity of the case in the course of the judicial proceeding."

This principle was followed in a later case in *Abdul Rahman v. Emperor* (3). The principle referred to above applies with greater force to the present case, in which the proceeding has been taken under S. 193, I. P. C., against the petitioner. I therefore hold that the order of the Subdivisional Officer directing the prosecution is bad and should be set aside on the above ground alone. It appears that the reason for holding that the statements of the petitioner are false is that the Sub-Inspectors examined by Messrs. Haider and Kaviraj denied the truth of those statements. The fact that the police authorities were directed to cross-examine the complainant's witnesses shows that the direction of the Honorary Magistrate and the other Magistrates to record evidence of the complainant's witnesses was not in pursuance of an order under S. 202, Criminal P. C., inasmuch as the accused or the police officers had no locus standi to appear and cross-examine the witnesses for the complainant in an enquiry under S. 202, which enquiry is strictly restricted to the taking of the complainant's evidence ex parte. For all these reasons the order directing the prosecution of the petitioner for giving false evidence under S. 193, I. P. C., is illegal and I accordingly set it aside.

V.S./R.K.

Order set aside.

(2) [1906] 33 Cal. 30.

(3) [1908] 7 C. L. J. 371.

A. I. R. 1919 Patna 268

DAWSON-MILLER, C. J. AND FOSTER, J.

Gopalji Sah—Plaintiff—Appellant.

v.

Manbirti Kuer and others — Defendants—Respondents.

Second Appeal No. 622 of 1918, Decided on 8th August 1919, from decision of Dist. Judge, Saran, D/- 4th February 1918.

(a) Hindu Law — Alienation — Widow—Necessity—Benefit of husband's soul is good

consideration for gift—Gift must not be of excessive portion.

A gift of family property by a Hindu widow for the benefit of her husband's soul is permissible and is just as valid and binding on the reversioners as if the gift had been made for purposes of legal necessity. But a gift for such a purpose must not amount to an exorbitant or excessive portion of the whole property.

[P 269 C 2]

(b) Hindu Law — Alienation — Widow—Necessity—Proof—On prima facie proof of necessity, burden of proving gift to be excessive shifts on reversioner.

Where in a case the donor adduces evidence showing a prima facie case which would justify such a gift, it is for the objecting reversioner to prove that the property alienated was excessive and that therefore the gift was not justified.

[P 269 C 2]

Harihar Prasad Singh — for Appellant.

Ganesh Dutt Singh—for Respondents.

Dawson-Miller, C. J. — This is an appeal by the plaintiff from a decision of the District Judge of Saran, dated 4th February 1918, affirming a decision of the Subordinate Judge. The plaintiff who is described by the District Judge as a fairly well-to-do man with several houses of his own is the next reversionary heir of the late Lalchand Ram, who died some years ago leaving a widow, defendant 1, but no male issue, and who appears to have been a devout Hindu. During his lifetime he gave away much of his property for religious purposes. On 7th May 1909, some ten years after her husband's death, defendant 1 executed a deed of gift of a house, part of the property inherited from her husband, in favour of Sheodip Misra, defendant 2. A few years later, on 10th November 1914, defendant 2 executed a zarpeshgi deed in respect of the said house in favour of defendant 3 for the sum of Rs. 1,000. It appears from the evidence that defendant 2, the original donee, has spent money in repairing the house, amounting to some Rs. 200 or Rs. 300, before the zarpeshgi deed was effected. Shortly afterwards, on 12th January 1915, the plaintiff, although up to that time he appears to have taken no steps to get the deed of gift set aside, instituted the present suit claiming a declaration that the deed of gift on 7th May 1909 executed by the widow in favour of defendant 2 was without legal necessity and fraudulently executed and not binding upon him as reversioner of Lalchand Ram. The defence to the action was that the gift was made on the anniversary of her husband's *sradh*

and was for his spiritual benefit and that a gift of such a nature was, according to Hindu law, justifiable on the part of the widow.

The District Judge found that the widow gave the house in question to defendant 2 who is a Brahmin, on the anniversary of her husband's death and that she did so with religious motives. It is not disputed that it is competent to a Hindu widow to alienate portions of the family property for religious purposes and more particularly if the gift should be conducive to the spiritual welfare of her late husband. The plaintiff by his plaint alleged that the resources of the family were not such as to justify the gift of property of such value. The intrinsic value of the property itself is not great and according to the finding of the lower Court there was no evidence on the record to show that at the time of the gift in question the widow had no other property which she inherited from her husband than the disputed house and as far as can be gathered from the judgments of both the lower Courts, there does not appear to have been any direct evidence as to the actual extent of the family property held by the widow at the time of the gift. In dealing with this aspect of the case, the District Judge said that apparently all that passed to the widow from her late husband was this house. If as a fact there was no evidence on the record to show that the widow at that time had no other property inherited from her husband than the house in question, it is difficult to see how the District Judge arrived at this conclusion. It is not a distinct finding of fact that the widow had no other property and I think it was in all probability, a view taken by him as to the probable state of affairs owing to the absence of any evidence upon the subject. Both the Subordinate Judge and the District Judge dismissed the suit. The former held that the gift in question was for the benefit of the soul of the late Lulchand Ram and as such was properly made by his widow on the day of the first barkhi srath of her deceased husband. He however thought that even if it was the only property in her possession, she would even then be justified in alienating it for such a purpose.

The District Judge also found that the alienation was a religious one made by

the widow to benefit the soul of her deceased husband and that such an alienation was valid. He did not decide the question of whether the gift would be valid if it were a gift of an unreasonable and excessive portion of the estate, although he mentions the point as having been raised and adds, as already stated, that the house was apparently all that passed into the widow's hands at the date of her husband's death. He thought however that the plaintiff's only object in bringing the suit was to give vent to his annoyance at the fact that defendant 3 had acquired the zarpeshgi interest in the property. The judgment is not altogether satisfactory. There can be no doubt that a gift of family property by a Hindu widow for the benefit of her husband's soul is permissible and is just as valid and binding on the reversioners as if the gift had been made for the purposes of legal necessity. This however is subject to the rule discussed in the case of *Pannachand Chhotalal v. Manoharlal Nandlal* (1) that the gift for such purposes must not amount to an exorbitant or excessive portion of the whole property. In the present case it is stated by the Subordinate Judge that there was no evidence as to whether the widow possessed other property in addition to the house in question and the District Judge has not in terms found otherwise. In this state of affairs, as I have already indicated, I think it must be taken that when he says there was apparently no other property which passed to the widow all he meant was that so far as the evidence went, there was nothing to show that she had any other property.

The question which then arises is, whether in the absence of any evidence upon this matter, the plaintiff or the defendants ought to succeed. The onus was certainly upon the defendants in the first instance to adduce evidence showing a prima facie case which would justify the gift. This I think they did when they proved that the gift was for the spiritual benefit of the deceased. It then lay upon the plaintiff to make out that the property alienated for such a purpose was excessive and therefore not justified. In this respect it would appear that the plaintiff failed to establish the case which he set up in his pleadings that the resources of the family were not such as

(1) [1918] 42 B.M. 136=43 I. C. 729.

to justify the gift of property of the value of that in question. For this reason I think this appeal fails and must be dismissed with costs.

Foster, J.—I agree.

V.S./R K.

Appeal dismissed.

A. I. R. 1919 Patna 270

ATKINSON AND MANUK, JJ.

Mt. Chandramani Koer—Defendant—Petitioner.

v.

Basdeo Narain Singh and others—Opposite Parties.

Civil Revn. No. 113 of 1918, Decided on 10th December 1918, from order of Addl. Sub-Judge, Gaya, D/- 7th May 1918.

(a) **Court-fees Act (1870), S. 12**—Order rejecting plaint, if based on question of valuation only is non-appealable—But if it necessarily involves decision of category or class under which suit falls it is appealable though question of valuation is decided—Civil P. C. O. 7, R. 11.

Section 12, Court-fees Act, bars an appeal against an order rejecting a plaint under O. 7, R. 11 (b) or (c), Civil P. C., when such order is based on a question of valuation pure and simple. [P 275 C 2]

Where however the order necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. [P 275 C 2]

(b) **Government of India Act (1915), S. 107**—Right of appeal barred—Question of jurisdiction involved—High Court can interfere either under S. 107 or Civil P. C. (1908), S. 115.

In cases where the right of appeal is barred, if the order involves a question of jurisdiction, the High Court can interfere either under S. 115, Civil P. C., or under S. 107, Government of India Act, by virtue of the residue of jurisdiction which the Court will always exercise wherever it appears that there has been something in the nature of a denial of fair trial. [P 275 C 2; P 276 C 1]

(c) **Civil P. C. (1908), O. 7, R. 11 (c)**—Plaint rejected—Court contemplated in S. 12, Court-fees Act, may for sufficient reasons review its order of demand on application by plaintiff or revise it of its own motion.

Before or after an order of demand fructifies by noncompliance into a recorded order of rejection of the plaint under O. 7, R. 11 (c), Civil P. C., the Court contemplated in S. 12, Court-fees Act, may for good and sufficient reasons, review its own order of demand on application by the plaintiff, or revise that order by its own motion. [P 276 C 1]

Hasan Imam, Purnendu Narain Sinha and Kailaspati—for Petitioner.

Susil Madhab Mullick and Sunder Lal—for Opposite Parties.

Manuk, J.—This is an application, under S. 115, Civil P. C., inviting us to

revise an order of the Additional Subordinate Judge of Gaya, dated 7th May 1918. It is necessary to set out the facts briefly for the purpose of considering the question of law arising for our determination. The petitioner is the only daughter of one Sital Prasad; of the opposite party No. 1 is her adopted son and Nos. 2, 3 and 4 claim to be the Gotias or reversionary heirs of her father. In the year 1917 the opposite party joined in instituting a suit against the petitioner "for the administration of the properties left by her father Sital Prasad by the appointment of a receiver,"

as stated in the application for revision. That suit was valued at Rs. 58,000 for the purpose of jurisdiction, but the plaint bore a court-fee of Rs. 10 only. The petitioner as defendant in that suit objected that an ad valorem court-fee ought to be paid by the plaintiff. On this objection the learned Subordinate Judge recorded an order on 24th April 1918 in the following terms:

"In this case the plaintiff has paid court-fees of Rs. 10 only. The plaintiff wants appointment of a receiver during the lifetime of the female owner on the allegation that she is wasting the property. This is undoubtedly a prayer for consequential relief and ad valorem court-fees ought to have been paid. The plaintiff is therefore required to pay in the deficit court-fees on the value of the property in suit within ten days from this date, otherwise the plaint will be rejected".

On 4th May 1918 the plaintiffs-respondents applied for a review of that order. After hearing the pleaders for both parties, the learned Subordinate Judge passed an order on 7th May 1918, granting the application for review, setting aside his order of 24th April 1918 and directing that the case should proceed without payment of any additional court-fee. He based this order mainly on a decision to which his attention was drawn: *Manmatha Nath Biswas v. Rohilli Moni Dasi* (1), and held that as the claim for the appointment of a receiver could not be valued, Sch. 2, Art. 17, Cl. (vi), Court-fees Act, would govern the case. He pointed out that the plaintiffs did not want a declaration that the properties were being wasted nor did they want an injunction upon the defendant. The learned Subordinate Judge also frankly admitted that he would not have passed the order of the 24th April if his attention had been drawn to the

(1) [1905] 27 All. 406.

decision in *Manmatha Nath Biswas v. Rohilli Moni Dasi* (1). He therefore felt he was "not justified in pressing for payment of the additional court-fees." It is against this last order that the petitioner has moved this Court, and the only point taken by Mr. Hasan Imam on her behalf is that under S. 12, Court-fees Act (7 of 1870), the order of the 24th April was final as between the parties to the suit and could not be the subject of review.

A preliminary objection was taken on behalf of the respondents that the application to this Court for revision of the order complained of was incompetent, inasmuch as an appeal lay from that order under the Civil Procedure Code, O. 43, R. 1(w). This objection however was subsequently withdrawn, as we intimated during the hearing that we were prepared to treat the application as an appeal for the limited purpose of deciding only whether the Subordinate Judge had jurisdiction to review his order of the 24th April. The application remains therefore before us as an application under S. 115, Civil P. C. S. 12, Cl. (1), Court-fees Act, lays down:

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint shall be decided by the Court in which such plaint is filed and such decision shall be final as between the parties to the suit."

Clause (2) of that section enables a Court of appeal, reference or revision, before whom the suit comes, to levy an additional fee in the event of the question having been wrongly decided to the detriment of the revenue. It will be observed that the Court under Cl. (2) cannot reduce the fee if the decision of the lower Court was to the detriment of the subject and to the advantage of the revenue: *Narayan Madhavrao Naik v. Collector of Thana* (2). The point for our determination really turns on the interpretation of the words in Cl. (1):

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable;"

for it is only to the decision of such a question that the legislature has given finality. The interpretation of these words has been the subject of numerous decisions of all the High Courts, except, so far as I know, our High Court. The matter has usually come before them by

(1) [1877] 2 Bom. 145.

way of appeals from orders rejecting plaints passed under S. 54, Civil P. C. (Act 14 of 1882), or, since the Civil Procedure Code of 1908, from similar orders passed under O. 7, R. 11, Cls. (b) and (c). For the purposes of the matter we are now considering there is no practical difference between the provisions of the old and new Codes in this particular respect. It is to be observed that such orders were expressly included in the definition of a decree under S. 2 of the Code of 1882, even as they are now so included under S. 2, Cl. 2 of the Code of 1908. Now, under S. 540 of the Code of 1882, even as under S. 96, Cl. (1), of the Code of 1908, such orders were and are appealable as decrees save where otherwise expressly provided in the Civil Procedure Codes themselves, or by any other law for the time being in force.

There was under the old Code, and there is under the new Code, no such express saving provision, and the question therefore resolves itself, under either Code, into a question as to whether appeals from such orders are barred by S. 12, Cl. (1), Court-fees Act. It may be taken as having been conceded before us that the right of appeal from an order rejecting a plaint under O. 7, R. 11, Cls. (b) or (c), is the touchstone whereby the finality contemplated by S. 12, Court-fees Act, may be tested, and that the right of the Court to review its original order would a fortiori follow on the right of appeal from such order as a matter of course. No argument to the contrary has been advanced and no suggestion made; nor indeed in principle could any such argument be advanced, for, if a Court of appeal may correct an erroneous order rejecting a plaint despite the provisions of S. 12, Court-fees Act, it is obvious that the Court passing the order may for good cause review its own erroneous order, instead of driving the aggrieved plaintiff to disobey that order, await the rejection of his plaint and then appeal against this rejection.

Quite apart from principle however an order on review would, strictly speaking, be within the terms of S. 12, Cl. (1), Court-fees Act, as a decision by the Court in which the plaint or appeal was filed; at any rate far more so than a decision by another Court on appeal; and it would be equally so whether the order of de-

mand had fructified by noncompliance into an order of rejection or not. We are of opinion that there is nothing in the Civil Procedure Code or in S. 12, Court-fees Act to debar a Court of first instance from reviewing for good and sufficient reason its decision on all questions relating to valuation for the purpose of determining the amount of fee chargeable on the plaint. On the contrary, under the new S. 151, Civil P. C. of 1908, the Court has an inherent power to make such orders as may be necessary for the ends of justice in order to prevent the abuse of the process of the Court, and under S. 152 the Court has a right to correct arithmetical mistakes in orders generally, or errors arising therein from any accidental omission. To take an illustration suppose a Court has by an arithmetical miscalculation or other inadvertence demanded an exorbitant court-fee from a plaintiff and passed an order on him to pay the deficiency on pain of his plaint being rejected. If that error is observed by the Court or brought to its notice after that order has been placed on the order sheet, can it be contended that the Court has not the power to correct its error and thereby prevent the abuse of the Court's process in illegally extorting a court-fee to which the revenue was not entitled under the law? I am decidedly of opinion that it has. If it did so, it would be thus reviewing or revising its own order, for there is not particular magic in the word "review." To hold otherwise would be to hold that judicial extortion may be indulged in under legislative sanction. I emphatically decline to subscribe to such proposition.

I turn now to the judicial interpretation of the section by the Indian Courts. As far back as 1871 the Calcutta High Court had to consider a similar question which arose under Art. 11, Sch. B, to Act 25 of 1867 and held that an order passed under that article is not final so as to bar an appeal where the decision of the Munsif on the valuation took the case beyond his jurisdiction. The great inconvenience which would result from any other interpretation was well illustrated by Norman, J., in the course of his judgment: *Collector of Sylhet v. Kalee Coomar Dutt* (3). In 1873, the same Court held that though it was not

open to the appellant under S. 12, Court-fees Act, to dispute the correctness of the Munsif's finding on the question of valuation there was nothing in that section to prevent him from appealing under the provisions of S. 36, of the then Civil P. C., and from urging that the Munsif was wrong in holding that the case was not governed by the provisions of a different article of the Court-fees Act: *Gunga Monee Chowdhrair v. Gopal Chunder Roy* (4).

In 1877 the Bombay High Court took a precisely contrary view and held that the right of appeal to which the plaintiff might have been entitled under Ss. 31 and 36, Civil P. C. (Act 8 of 1859), had been taken away by S. 12, Cl. (1), Court-fees Act (7 of 1870): *Narayan Madhavrao Naik v. Collector of Thana* (2). In the same year the Allahabad High Court held that S. 12, Court-fees Act, does not prevent a Court of appeal from determining whether or not consequential relief is sought in a suit, so that it may determine under what class of cases the suit falls for the purposes of that Act. It held however that S. 12 prohibits appeals on questions relating to valuation for the purpose of determining the amount of fee. It pointed out that when a certain fee is fixed by the Act for all suits of a certain nature no question of valuation arises: *Chunia v. Ram Dial* (5). Three years later the Calcutta High Court definitely held in general terms that the provisions of the then Civil Procedure Code (Act 8 of 1859 amended by Act 10 of 1877) removed the finality declared by S. 12, Court-fees Act, and allowed an appeal from an order rejecting a plaint as insufficiently stamped: *Ajoodhya Pershad v. Gunga Pershad* (6).

In 1881, the Madras High Court refused to give to the terms of S. 12 a larger interpretation than they fairly admit of, and held that they do not declare the decision of the Court mentioned in Cl. (1) to be final on all questions which may arise respecting the court-fee but only on every question relating to valuation for the purpose of determining the amount of fee. Valuation, the Court said, may be a mere arithmetical calculation or may involve the decision of a

(4) [1873] 19 W. R. 214.

(5) [1875-78] 1 All. 360.

(6) [1881] 6 Cal. 249.

(3) [1871] 7 B. L. R. 663.

simple question of fact while on the other hand apart from the valuation necessary to determine the fee, questions of much nicety may arise respecting the fee properly leviable. It pointed out that the amended Code of Civil Procedure (Act 10 of 1877) had apparently accepted the construction of the Court-fees Act adopted by the High Court of Bengal in *Gunga Monee Chowdhrair v. Gopal Chunder Roy* (4) and *Collector of Sylhet v. Kalee Cooumar Dutt* (3) and the High Court of the North-Western Provinces in *Chunia v. Ram Dial* (5) since the decision in *Narayan Madhavrao Naik v. Collector of Thana* (2) which was governed by the Civil Procedure Code (8 of 1859): *Annamalai Chetti v. Lt. Col. J. G. Cloete* (7). Then followed in 1882 the decision in *Omrao Mirza v. Mary Jones* (8), in which it was distinctly held that the definition of a decree in S. 2, Civil P. C. 1882, had altered the law laid down in *Narayan Madhavrao Naik v. Collector of Thana* (2), and that S. 12 applies merely to valuation when there is no question as to the article of the schedule of the Act with reference to which the valuation is to be made, and was not intended to apply to a case in which it was contended, not that the suit had been wrongly valued, but that the relief had been improperly estimated by putting it under a wrong article in the schedule of the Act. It is true the rule in that case was discharged on the ground that the proper course to adopt was to wait till the plaint was rejected under S. 54 (a), Civil P. C., and not to come up on revision against the demand of an extra sum. This however does not affect the question. The plaintiff in that case in compliance with that decision, waited till his plaint was rejected, appealed to the High Court and his appeal was allowed *Omrao Mirza v. M. Jones* (9).

The question there was whether the plaint was filed within Cl. (3) or Cl. (6), Art. 17, Sch. 2, Court-fees Act, and the contention of the plaintiff-appellant was that the Subordinate Judge had misconceived the true nature of the suit. Two years later a Full Bench of the Bombay High Court held that an appeal lay against orders on the question whe-

ther or not any particular suit was one admitting of valuation by the Judge, but no appeal lay when once it was found that the valuation made by him was within his proper functions: in the latter case his decision and the several elements of it are conclusive as between all parties. An attempt was made to explain the decision in *Narayan Madhavrao Naik v. Collector of Thana* (2), but in my opinion without any great success. The Full Bench further expressed its opinion that a decision on a question of valuation was subject to revision by the High Court under S. 622, Civil P. C., and Regn. 2, S. 5 of 1827 in a certain class of cases *Vithal Krishan v. Balkrishna Janardan* (10).

A Full Bench in the Allahabad High Court next considered the question in *Muhammad Sadik v. Muhammad Jan* (11) and held that the intention of the framers of the Code of Civil Procedure 1882 was that there should be an appeal in every case falling within S. 54 of that Code. The Full Bench thought that it was unnecessary to consider whether S. 12, Court-fees Act, could be reconciled with the provisions of the Code, as the Madras High Court had attempted to do in *Annamalai Chetti v. Lt.-Col. J. G. Cloete* (7), but intimated that they would have great difficulty in concluding that a Court can determine the amount without deciding the question as to the relief sought; and yet that the relief sought was not a question relating to the valuation for the determination of the fees chargeable. Another Full Bench of the same Court had to consider the question as to the finality of orders passed under S. 5, Court-fees Act, and for the purpose of analogy compared the provisions of S. 12 of that Act. Sir John Edge, C. J., who had been a party to the decision in *Muhammad Sadik v. Muhammad Jan* (11), in delivering the main judgment of the Court in the later case, explained that those authorities, which had held that the right of appeal lay, really decided only so much, viz., that a question as to the category of the relief sought is not

“a question relating to valuation for the purpose of determining the amount of any fee chargeable.”

He admitted that the decision in *Muhammad Sadik v. Mahammad Jan* (11)

(7) [1882] 4 Mad. 204.

(8) [1883] 12 C. L. R. 148.

(9) [1884] 10 Cal. 599.

(10) [1886] 10 Bom. 610.

(11) [1888] 11 All. 91.

to which he had been a party had gone too far in deciding that an appeal lay from a decision under S. 54, Civil P. C., which was also a decision within the meaning of S. 12, Court-fees Act. The learned Chief Justice considered that so far, if at all, as S. 54, Civil P. C., applied to decisions under S. 5 or S. 12, Court-fees Act, orders under S. 54, Civil P. C., came within the exceptions contained in Ss. 540 and 584 of the then Code, i. e., appeals were excluded by S. 12, Court-fees Act, as being another law for the time being in force *Balkaran Rai v. Gobind Nath Tiwari* (12):

In the same year a Division Bench of the Madras High Court followed the Calcutta decision in *Ajoodhya Pershad v. Gunga Pershad* (6) and held on second appeal that when it was not a mere question of amount or arithmetical calculation, a decision of the lower appellate Court may be revised by the High Court *Kanaran v. Komappan* (13). The question again came before the Full Bench of the Allahabad High Court in *Amjad Ali v. Muhammad Israil* (14). The facts of the case are instructive; a plaint was presented in the Court of a Subordinate Judge on 16th November 1893, the last day within the period of limitation. On that day the Court Munshim reported that the court-fees paid were insufficient. The Subordinate Judge ordered the plaint to be returned and directed that it should be presented again within four days along with the deficient court-fee duty. As a matter of fact the plaint was not returned to the plaintiffs on 16th November; on the following day they appeared before the Subordinate Judge and put in a petition objecting to his order, but at the same time they lodged in Court the additional amount under protest.

On this petition the Court ordered the deficient court-fee to be paid, which was done, and the plaint was then admitted and registered. At the hearing of the suit the defendants contended that the plaint as presented on 16th November being insufficiently stamped was an invalid plaint, and that as the deficient duty was not paid till the following day the suit was barred by limitation. The plaintiffs replied that the court-fees paid on

16th November were sufficient, that the Court had acted erroneously in compelling them to pay a larger sum and that therefore the plaint, as presented on 16th November, was a valid plaint. A preliminary issue as to limitation was framed, and after hearing arguments the Subordinate Judge decided that the suit was not barred, as he now held that the stamp duty paid on 16th November was sufficient. The suit was ultimately dismissed on the merits. On an appeal to the District Judge by the plaintiffs, the defendants objected under S. 561, Civil P. C., 1882, contending that the Subordinate Judge was wrong in holding that the suit was not time barred and that the plaint was properly stamped. The District Judge on these pleas held that the plaint was insufficiently stamped on 16th November and was therefore barred. On second appeal to the High Court the case was referred to a Full Bench and was argued on the effect of the words: "Such decision shall be final as between the parties to the suit." The question was whether the first order of 16th November or the later order at the hearing was the "decision" contemplated by S. 12.

The Full Bench held that the later of the two orders must be considered to be the "decision" referred to in S. 12. The ratio decidendi apparently was that when the order of 16th November was passed, it could hardly be said that there were any parties or any suit, and that the words of S. 12, read in their natural and literal sense, are wholly inapplicable to a case in which a plaint had not been "filed," as distinguished from "presented" and in which there was therefore no existing suit and no parties to such suit. The order of 16th November was in the learned Judges opinion merely an interlocutory order which the Court may vary as long as it has seisin of the case. In the case of *Bankey Behari v. Ram Bahadur* (15) such an order was revised by this Court, though the provisions of S. 12, Court-fees Act, were not considered. One of us was a party to that decision.

It should be mentioned that in the Allahabad case all questions of rejection of a plaint under S. 54, Civil P. C. (1882), were expressly excluded from the scope of the decision. It will be observed that the facts in that case were very similar

(12) [1890] 12 All. 129.

(13) [1891] 14 Mad. 169.

(14) [1897] 20 All. 11 (F. B.).

(15) [1913] 44 I. C. 801.

to the facts before us inasmuch as in the case before us the plaintiff applied, within the ten days allowed by the Court in its first order for the deposit of the deficit, to review that order; and at the subsequent hearing, the Court did review that order and came to the decision which we are now asked to revise. In *Dada Bhaui Kittur v. Nagesh Ramchandra* (16) the question was whether the suit fell for purposes of court-fees under Cl. (x) or Cl. (ix) S. 7, Court-fees Act. The Court of first instance held that it fell under the former clause, demanded an excess court-fee and on the plaintiff failing to comply with the demand, dismissed the suit. The Court of first appeal held that the question was one of valuation and the appeal was therefore incompetent. The Bombay High Court on second appeal held that the order was clearly appealable as there was no question of valuation; and the only valuation made, that is the valuation of the consideration was admitted. In other words it was a question of the application of the law rather than a question of valuation.

Coming to more modern decisions, the Calcutta High Court in *Studd v. Mati Mahto* (71) approved of the earlier decisions in favour of a right of appeal and held that S. 12 was no bar to the appeal, as the question to be decided was the class of the suit in order to ascertain in what schedule of the Act it must be taken to fall for the purpose of fixing the court-fee. In *Prokash Chandra v. Raja Bisumbhar Nath* (18) the Calcutta High Court carried the same principle to its extreme extent. The plaintiff had valued the relief at Rs. 2,100, the defendant had valued it at Rs. 50,000, the Subordinate Judge decided that the market value of the subject-matter of the suit was at least Rs. 24,000, and demanded institution fees on that value, and on noncompliance, dismissed the suit. The Court of first appeal held that the valuation arrived at was excessive, fixed the valuation at Rs. 10,120, and directed that institution fees on that value should be accepted. On appeal by the defendant, the High Court held that S. 12 Court-fees Act, was passed mainly for fiscal purposes and prevented the parties from contesting the decision of the first Court so far as that decision

was arrived at for those purposes only; but that when the result of the decision on valuation was to deprive the plaintiff of the right which he sought to enforce, thereby affecting the merits of the plaintiff's suit, the decision was appealable.

In *Peari Shah v. Surja Mal* (19) the basis of the decision was that the question in that case was not a question relating to valuation for determining the fees chargeable but relating essentially to the jurisdiction of the Subordinate Judge to entertain the suit. In this case, it may be observed that the jurisdiction, of the Subordinate Judge depended on the valuation placed by him on the right of easement, yet the High Court held the order was not final within the meaning of S. 12. *Sundar Mal Marwari v. J. C. Murray* (20) is direct authority for the proposition that where the question is one as to class and not merely of valuation, not only does the right of appeal lie, but the High Court is competent to exercise its revisional jurisdiction under S. 115, Civil P. C. and also to revise the proceedings of the lower Court under S. 15 of the Charter Act.

The decision of the Madras High Court in *Tekana Kavandan v. Aligiri Kavandan* (21) apparently goes to the other extreme, but it is not a considered decision and none of the earlier cases was referred to. The Punjab Chief Court in *Mt. Sada Kaur v. Buta Singh* (22) declined to interfere in revision with an order rejecting a plaint, on the ground that an appeal from the order was competent.

The correct principles, in my opinion, deducible from the above authorities as well as from a careful consideration of the provisions of Civil P. C. and of the Court Fees Act are : 1. An order rejecting a plaint under O. 7, R. 11, Civil P. C. is not appealable when such order is based on a question of valuation pure and simple. 2. When the order necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation, the order is appealable. 3. In cases falling under (1) where the order involves a question of jurisdiction, the High Court may interfere either

(16) [1899] 23 Bom. 486.

(17) [1901] 28 Cal. 334.

(18) [1910] 5 I. C. 18.

(19) [1912] 16 I. C. 575.

(20) [1912] 16 I. C. 963.

(21) A. I. R. 1914 Lah. 80=25 I. C. 506.

(22) A. I. R. 1914 Lah. 153=80 P. R. 1914=25 I. C. 565.

under S. 115, Civil P. C., or under S. 107 of the Government of India Act, "by virtue of the residue of jurisdiction, which the Court will always exercise wherever it appears that there has been something in the nature of a denial of the right of fair trial"

Per Mullick, J., in *Braja Bhushan Trigunait v. Sris Chandra Tewari* (23).

Before or after an order of demand fructifies by non-compliance into a recorded order of rejection, the Court contemplated in S. 12 Court Fees Act may for good and sufficient reasons review its own order of demand, on application by the plaintiff, or revise that order of its own motion.

I am fortified in these conclusions by the fact that though the Court Fees Act, S. 12, dates from 1870 of Civil P. C. was remodelled in 1882 and again in 1908, and the Legislature could not have been in ignorance of the judicial interpretations placed on S. 12 in the various decisions referred to above of all the High Courts; nevertheless, the Legislature did not think fit, either in 1882 or at any rate in 1908, to insert a simple provision in the Civil P. C. declaring a finality other than that declared by judicial interpretation between 1870 and 1908. The Court Fees Act is essentially a fiscal enactment. Its primary object is to provide for and protect the revenue and not to coerce the subject; and it is for this reason that the Legislature has intentionally so framed S. 12 and the relevant provisions of Civil P. C. as to leave the question elastic. In any event, I am of opinion that, according to the well-recognized practice of this Court, we should follow the firmly established "*cursus curiæ*" of the Calcutta High Court and I would accordingly dismiss this application with costs. We express no opinion as to the merits of the order respecting the Court-fee, nor are we in a position to do so as the pleadings are not before us.

Atkinson, J.—I agree.

By the Court.—This application is dismissed with costs, hearing fee four gold mohurs.

V.S./R.K.

Application dismissed.

(23) [1918] 47 I. C. 719.

A. I. R. 1919 Patna 276

MULLICK AND ATKINSON, JJ.

Mt. Abbasi Begum—Appellant.

v.

Mt. Mustafa Begum and others—Respondents.

Appeal No. 106 of 1919 and Civil Revns. Nos. 87, 96 and 97 of 1919, and appeal from Original Order No. 106 of 1919, Decided on 22nd July 1919, from decision of Dist. Judge, Muzafferpur.

Guardians and Wards Act (8 of 1890), S. 24—District Judge's permission to marry to suitable bridegroom is not only desirable but essential—Shia girl's option to marry man of her choice after puberty is subject to sanction—Mahomedan Law, Marriage.

Where a guardian has been appointed by the Court of the property and person of a minor girl, it is within the competency of the District Judge to sanction her marriage with a particular bridegroom. Such sanction is not only ordinarily desirable, but is necessary for the purpose of determining the suitability of the proposed bridegroom. Under the Shia law such a minor girl, who has attained puberty and the age of discretion, has an absolute right to marry the man of her choice, subject always to the superintendence and, if necessary, the veto of District Judge in his capacity of *parens patriæ* by delegation from the Sovereign. [P 277 C 1, 2]

Khurshed Husnain—for Appellant.

Sultan Ahmad and Husan Jan—for Respondents.

Judgment.—This matter arises out of a proposal of marriage made by Mt. Mustafa Begum in respect of Umatus Sogra, her granddaughter by her daughter Mt. Kaniz Fatima. The application was made on 8th January 1918 before the District Judge of Muzafferpur. It appears that Mt. Umatus Sogra's father and mother are dead, and that in 1914 the District Judge appointed as the guardian of her person and property her paternal grandmother Mt. Abbasi Begum in conformity with the directions contained in the will of the minor's father. It is alleged on behalf of Mt. Mustafa Begum that, notwithstanding the appointment of a Court guardian, the girl has never been in the custody of Mt. Abbasi Begum; that she has since her father's death continuously resided in the house of Mustafa Begum at Muzafferpur; that she has been educated by her and that she is desirous of marrying one Mohammad Hussain who is connected with the family of Mt. Mustafa Begum. When the application of 8th January 1918 was filed by Mt. Mustafa Begum, Mt. Abbasi Begum filed a counter-application before the District Judge objecting

to the marriage and suggesting that the girl should be married to Akhtar Hussain, the son of one Nazir Hussain, residing at Muzafferpur. The District Judge, on 17th February 1919, disposed of both applications by an order in which he held that neither the paternal nor the maternal grandmother could be a guardian for marriage under the Shia law to which the minor is subject.

At this time he also had before him a petition purporting to come from Mt. Umatus Sogra herself and alleging that she had attained the age of puberty and discretion and that she desired to marry Mohammad Hussain. In regard to this petition the District Judge ordered an inquiry for the purpose of definitely ascertaining the wishes of the minor, and appointed Khan Bahadur Ahmad Hussain and Moulvi Muhammad Shafi, two Pleaders of the Muzafferpur Bar, to make the necessary inquiries. The report of these gentlemen was submitted on 27th February 1919. On 19th March 1919 in consequence of an application made on the 15th March by Mt. Abbasi Begum, the District Judge recorded an order refusing to allow Mt. Abbasi Begum permission to cross-examine the two commissioners, and to adduce evidence for the purpose of showing that their statements of the wishes of the minor were incorrect. On 31st March 1919 the District Judge disposed of the application of Mt. Umatus Sogra by an order granting sanction to her proposed marriage with Mohammad Hussain. On the same day he passed an order refusing the prayer of Abbasi Begum for the delivery of the body of Mt. Umatus Sogra to her care and custody. Against this part of the learned District Judge's order which purports to have been made under S. 25, Guardians and Wards Act, Mt. Abbasi Begum has filed Appeal No. 106 of 1919. Against the order of 31st March 1919 she has preferred a motion which has been numbered as No. 87 of 1919. Against the orders of 17th February and 19th March 1919 she has preferred the motions which have been numbered 96 and 97 of 1919. Now the first question to be considered is what are the powers of Mt. Umatus Sogra in the matter. It has been found as a fact by the learned District Judge that she has attained puberty and the age of discretion. She has therefore under the Shia law an absolute right to marry the

man of her choice, subject always to the superintendence, and if necessary, the veto of the District Judge in his capacity as *parens patriae* by delegation from the Sovereign.

It is contended by Mr. Khurshed Husnain that the Judge has no power to sanction a marriage, though he may always restrain a ward from making an unsuitable choice. In my opinion the Court has not only jurisdiction but it is its bounden duty, when apprised of a proposed marriage, to examine the fitness of the bridegroom and to advise the ward to the best of his ability. The power to veto the marriage implies necessarily the power to approve, and by recording the order of sanction in the present case he has done nothing whatsoever which can justify our interference under S. 115, Civil P. C. The case is still stronger where the minor herself, although she has made her choice, seeks the advice of the Court as a matter of courtesy, and I take it that the law contemplates that the welfare of the minor demands that no marriage should be performed without previous notice to the Court. On the point of jurisdiction therefore it seems to me that the contention of Mr. Khurshed Husnain is not well founded and must fail. The next question is, whether it is a fact that the lady has arrived at the age of puberty and discretion. Now in revision it is not ordinarily our practice to go into question of fact; but a very strenuous argument has been addressed to us as to the various irregularities committed by the learned District Judge in appointing the two vakils as commissioners and in accepting their statement without any cross-examination in Court. It has also been suggested that the proper course was for the Judge himself to have ordered the production of the minor in Court so that he might ascertain her wishes at first hand.

Now having regard to the customs of this part of the country and the status of the family to which the parties belong, we take it that it would have been impossible to secure the attendance of the minor in Court or to arrange that she should have been seen by the presiding officer himself. The Court adopted under the circumstances the procedure best suited to the object in view. He appointed two most respectable gentlemen who were personally known to him, one of

them being a Khan Bahadur and a member of the Legislative Council. From the record of their proceedings I am quite satisfied that there can be no shadow of reason for suspecting that they were actuated by any improper motives in the matter. It appears from the record that Syed Ahmad Hussain, who though not a relation has known the girl from her childhood and is addressed as dada or grandfather, took the girl into a room by herself and put questions to her, the answers being recorded by Maulvi Muhammad Shafi who was sitting at the door. Nobody who reads these answers can fail to draw the inference that they give an accurate statement of what she said, and that they represent her own views with regard to the choice of a husband. A certificate to this effect has also been appended by the two gentlemen themselves. In the statement the girl says that she is sixteen years of age, and on being asked whether she wishes to marry the eldest son of Qasim Mian or the youngest son of Nazir Mian, and on being warned that her choice would affect her whole future and was to be made after the most anxious consideration, she answered: "I would like to make a marriage with Qasim Mian's eldest son." She was then asked whether she had spoken under the influence of anyone else, that is to say, her paternal or maternal grandmother, and her answer again was: "No; I have said so of my own free will."

Under these circumstances it is impossible to hold that the learned Judge was not right in believing that the considered decision of Mt. Umatus Sogra was to marry Mohammad Hussain and to refuse the proposal of Akhtar Hussain. As to her age, and as to the fact of her having attained puberty, the report gives adequate grounds for holding that the finding of the District Judge was correct. Under these circumstances the suggestion that we should remit the case for the examination of witnesses in Court is one which we cannot accept. It has been stated by Mr. Khurshed Husnain that Syed Ali Nawab, the husband of Mt. Mustafa Begum, is opposed to the marriage, and that he being the nearest and eldest male relative on either side the omission of the learned District Judge to consult him vitiates his finding. We have no definite information of the

wishes of this gentleman in the matter. If any reliance is to be placed upon the affidavit furnished by Mt. Mustafa Begum, it would seem that he in 1916 was in favour of the marriage. However we do not attach any importance to his wishes, because the District Judge had jurisdiction to decide upon the suitability of Mohammad Hussain; and in the absence of anything to the contrary he has, in our opinion, given a very proper decision. The proposed bridegroom is a B. A., and is reading for the B.L. degree. There is a disparity of about ten years between him and his bride, but this, in the circumstances, is not a very great disadvantage.

We have been asked by Mr. Khurshed Husnain to prescribe directions as to the procedure which should be followed in regard to proposals for the marriage of wards of Court. We consider it unnecessary to lay down any hard and fast procedure, but we may say that we approve generally of the procedure laid down by their Lordships of the Calcutta High Court in the case of *Monijan Bibi v. District Judge of Birbhoom* (1). We have given effect to the principles followed in that case in holding that ordinarily the sanction of the Court is desirable, if not necessary, for the purpose of determining the suitability of the proposed bridegroom. The procedure suggested by their Lordships is one which commends itself to reason and is not contrary to law, and consequently, in our opinion, it should, wherever possible, be followed. In this view of the case the applications for revision in Cases Nos. 87, 96 and 97 of 1919 must be dismissed. With regard to Appeal No. 106 of 1919, no doubt under ordinary circumstances the guardian appointed by the Court would have the right to the custody of the person of the minor; but as she has attained puberty and is of the age of discretion, her marriage with Mohammad Hussain will immediately make Mohammad Hussain the lawful guardian of her person; and that being so, it is undesirable that we should direct her to be delivered into the custody of Mt. Abbasi Begum. There is also the further ground that, according to the finding of the learned Judge, the girl has for a long time been in the custody of Mt. Mustafa. The petition of Mt. Abbasi Begum does not disclose how or

(1) A. I. R. 1915 Cal.=42 Cal. 351=25 I. O. 229.

when the girl was removed from her custody, and we think that there is ground for the suggestion of the opposite party that she has not for many years been in the custody of the guardian appointed by the Court. Taking all the circumstances into consideration we do not think that we should, under S. 25 Guardians and Wards Act, compel the minor to reside at present with Mt. Abbasi Begum. The appeal and the motions are dismissed with costs. There will be one hearing fee in all these matters, assessed at five gold mohurs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 279

DAWSON-MILLER, C. J. AND COUTTS, J.

Bir Kishore Roy--Applicant.

v.

Emperor--Opposite Party.

Privy Council Appeal No. 93 of 1918,
Decided on 8th May 1919.

Legal Practitioners' Act (1879), S. 13—Order under S. 13—There is no provision conferring right of appeal to Privy Council—Letters Patent (Patna). Cls. 31 to 34

The Legal Practitioners Act contains no provision conferring a right of appeal to the Privy Council from an order passed by a High Court under S. 13 of the Act. Cls. 31 to 38 of the Letters Patent dealing with the right to appeal to His Majesty in Council do not apply to orders passed in exercise of the administrative or disciplinary powers conferred upon the High Courts by Letters Patent or by Statute. [P 280 C 1]

S. A. Ashagar and Gajendra Prasad Das--for Applicant,

Sultan Ahmad--for the Crown.

Dawson-Miller, C.J.—This is a petition on behalf of Bir Kishore Rai, a pleader practising at Puri, in the Courts subordinate to the District Court of Cuttack, praying for leave to appeal to His Majesty in Council from an order passed by a Full Bench of this Court, under S. 13, Legal Practitioners Act, 1879, suspending him from practice for a period of six months from 7th February 1918. The circumstances under which the petitioner was suspended appear from the judgment of the Court in the matter of *Emperor v. Bir Kishore Rai* (1). There were three charges against him of accepting briefs for both sides. The first was a mortgage suit in which he appeared for the plaintiffs and signed the plaint and subsequently accepted a vakalatnama from the mortgagor, one of the defendants, and filed a written statement ad-

mitting the claim although other defendants, transferees, were contesting it. In the second case he appeared for a decree-holder in an execution case and subsequently appeared for the judgment-debtor praying for an order to set aside the sale obtained in execution.

In the third case he first appeared for decree-holder in execution, then appeared for an adverse claimant under O. 21, R. 58, in the same proceedings, and when that claim was dismissed and the property sold, finally appeared for the judgment-debtor seeking to set aside the sale. This Court found that this was grossly improper conduct in the discharge of his professional duty within S. 13 (b), Legal Practitioners, Act and suspended him accordingly. We are now asked to grant a certificate that the case is a fit one for appeal to His Majesty in Council. A preliminary objection has been raised that the Court has no jurisdiction to grant leave to appeal in such a case as the present, as no appeal lies unless their Lordships should decide for special reasons to admit it. There is no provision in the Legal Practitioners Act conferring a right of appeal from an order passed by the High Court under S. 13. It is contended however that under Cl. 31 of the Letters Patent by which this Court is constituted an appeal lies to His Majesty in Council. That clause provides that an appeal shall lie to His Majesty in Council in any matter not being of criminal jurisdiction (inter alia) any final order made in the exercise of original jurisdiction not coming under the operation of Cl. 10. Admittedly, the case is not covered by Cl. 10, which provides for appeals to the High Court itself from the decision of a single Judge, or of two or more Judges where they are equally divided in opinion. There is a proviso to Cl. 31 that the sum or matter at issue shall be of the amount or value of not less than Rs. 10,000, or that the judgment, decree or order appealed from shall involve a claim, demand or question respecting property of the like amount or value, and an appeal is also allowed.

"From any other final judgment, decree, or order made on appeal or otherwise as aforesaid when the said High Court declares that the case is a fit one for appeal."

The words "or otherwise as aforesaid" clearly refer to judgments decrees or orders passed in the exercise of original

(1) [1918] 3 Pat. L. J. 390=45 I. C. 684.

jurisdiction not being criminal jurisdiction or covered by Cl. 10. Cls 9 to 27 of the Letters Patent deal with the different clauses of jurisdiction which are conferred on the High Court. They are civil, criminal, admiralty, testamentary and intestate and matrimonial jurisdiction, appellate and original. The next three clauses deal with procedure, and Cls. 31 to 34 deal with appeals to the Privy Council. In my opinion, the clauses dealing with the right of appeal to His Majesty in Council were meant to be confined to the different clauses of jurisdiction above enumerated and not to the administrative or disciplinary powers conferred by the Court by earlier clauses in the Letters Patent or by Statute. The use of the word "jurisdiction" in Cl. 31 clearly seems to indicate that the appeals referred to are appeals from judgments, decrees, and orders passed in the exercise of one or other of the clauses of jurisdiction conferred by Cls. 9 to 27 where the word jurisdiction is used. In the clauses conferring administrative and disciplinary powers the word jurisdiction is nowhere used to describe such powers. In fact, the powers of removing or suspending from practice granted by Cl. 8 of the Letters Patent are confined to the cases of advocates, vakils and attorneys. The like power in the case of pleaders, is conferred only by S. 13, Legal Practitioners Act, and is not a power referred to in the Letters Patent at all. It has been held however by the High Court at Bombay that the right of appeal to His Majesty in Council granted by Cl. 39 of the Letters Patent of that High Court (corresponding to Cl. 31 in those of this Court) did not apply to orders passed suspending a vakil in the exercise of the disciplinary powers granted to that Court similar to those contained in the present Cl. 8.: See *G. S. D. v. Government Pleader* (2).

It was also held by the Supreme Court of Bombay in *Morgan v. Leech* (3) in 1841 that the charter granting an appeal from a "judgment or determination" did not apply to a rule of the Court refusing to strike a person off the rolls. Matters of this nature have generally been held to be the subject of special leave. *James Minchin, In re* (4) was a case where

the Supreme Court of Madras made an order dismissing the master of that Court from his office for alleged misconduct. On appeal to Her Majesty in Council it was pointed out by their Lordships of the Judicial Committee that there was no right of appeal under the Charter, and that the order was not made in the course of a judicial proceeding. The clause in the Charter in question was as follows:

"And it is our further will and pleasure and we do direct establish and ordain that if any person or persons shall find him, her or themselves aggrieved by any judgment or determination of the said Supreme Court of Judicature at Madras in any case whatsoever it shall be lawful for him, her or them to appeal to us our heirs or successors in our or their Privy Council in such manner and under such restrictions and qualifications as are hereinafter mentioned, that is to say, in all judgments and determinations made by the Supreme Court of Judicature at Madras in any civil cause the party or parties against whom or to whose immediate prejudice the said.....determination shall be or tend may by his or their humble petition to be preferred for that purpose to the said Court pray leave to appeal to us our heirs or successors in our or their Privy Council stating in such petition the cause or causes of such appeal."

Special leave was subsequently granted and the appeal was heard on the merits. The words "in any civil cause" in the Charter quoted do not appear to me to be less comprehensive than the words in Cl. 31 of this Court's Letters Patent which restrict appeals to judgments, decrees or orders passed in the exercise of appellate or original jurisdiction, such jurisdiction having already been defined in the preceding clauses, the only possible class which might apply to the present case being that described as civil jurisdiction. In *Safford and Wheeler's Privy Council Practice*, at page 789, the practice relating to this class of cases is referred to as the subject of special leave, and there can be little doubt that they have been so treated by the Judicial Committee for a considerable period. The judgment of the Bombay High Court in the case of *G. S. D. v. Government Pleader* (2), above mentioned, refers, to three earlier cases where the High Courts of Calcutta and Allahabad appeared to have granted leave but as pointed out in that judgment, those cases are of doubtful authority. In one of them, *Parbati Charan Chatterji, In the matter of* (5), it does not appear from the report whether leave

(2) [1908] 32 Bom. 106.

(3) [1837-41] 2 M. I. A. 428=1 Sar. 215 (P.C.).

(4) [1846-50] 4 M. I. A. 220 (P. C.).

(5) [1895] 17 All. 498=22 I. A. 193=6 Sar. 635 (P. C.).

was granted and in another [*Sashi Bhushan Sarbadhary*, In the matter of (6)] special leave was obtained. In my opinion this petition should be refused.

Coutts, J.—I agree.

V.S./R.K. *Application rejected.*

(6) [1907] 29 All. 95=34 I. A. 41 (P. C.).

A. I. R. 1919 Patna 281

MULLICK AND JWALA PRASAD, JJ.

Jatadhari Singh and others—Judgment-debtors—Appellants.

v,

Baldeo Lal — Decree-holder—Respondent.

Misc. Appeal No. 291 of 1918, Decided on 14th February 1919, from decision of Dist. Judge, Gaya, D/- 31st October 1918.

Civil P. C. (5 of 1908), O. 34, R. 4—Court has discretion to order whole or portion of property to be sold—Discretion should not be arbitrary so as to prejudice mortgagee's rights—Discretion vests in execution Court.

Under O. 34, R. 4, Civil P. C. it is the duty of the Court in making a mortgage decree to order that the mortgaged property or a sufficient portion thereof be sold. This gives a right to the Court making the decree to declare what portion of the mortgage properties shall first be sold, but that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is to give effect to this principle that the provisions relating to marshalling and contribution have been enacted.

In the absence of a direction in the decree to the contrary this discretion vests in the execution Court. [P 282 C 1]

Unless there are any equities requiring marshalling and contribution, the decree-holder has the fullest right to bring to sale whichever property he wishes first to sell. [P 282 C 1]

Per *Jwala Prasad, J.*—If a mortgage deed specifically says that the properties on default of payment of the mortgage-money would be sold in a particular order, it would not be open to the decree-holder to change that order in seeking to enforce the re-payment of his money. If there is no specific mention of the order in which the properties are to be proceeded against for the enforcement of the loan, the hands of the decree-holder would not be fettered. [P 283 C 1]

Garu Saran Prasad—for Appellants.

Naresh Chandra Singh, D. N. Sircar and Bimla Charan Sinha—for Respondent.

Mullick, J.—This second appeal arises out of the execution of a mortgage decree in respect of seven properties. In the first execution all the seven properties were put up to sale. There were no bidders for items 1, 2, 3 and 4. Property No. 5 was sold and fetched a sum suffi-

cient to discharge the decree, but on the objection of the judgment-debtors the sale was set aside. In the second execution only properties Nos. 4 and 5 were put up to sale. There were no bidders again for property No. 4 and property No. 1 alone was sold but that sale, too, was set aside. In the execution with which we are dealing, viz., the third execution, properties Nos. 4 and 5 were again put up to sale. There were no bidders for property No. 4 and property No. 5 was knocked down for a sum of Rs. 4,400.

The judgment-debtor made an application to set aside the sale on the ground of material irregularity and inadequacy of price and also on the ground that no notice of the settlement of the sale proclamation was served upon him. But it has been found on appeal by the District Judge that there was no irregularity in the conduct of the sale and the application was dismissed. The judgment is conclusive on this point and the learned vakil for the appellants admits that no second appeal lies so far as the objection on the ground of material irregularity is concerned. But he contends that it was the duty of the executing Court to sell the properties in the order given in the decree and that it was not open to the Court to sell property No. 5 before selling properties Nos. 1, 2, 3 and 4. It is contended that this is a question relating to the execution and satisfaction of a decree arising between the judgment-debtor and the decree-holder under S. 47 Civil P. C., and that therefore a second appeal lies against the decision in this matter. Now the question is whether a mortgagee decree-holder has a right to enforce his mortgage charge by the sale of any property over which his lien extends. The authorities in the Calcutta High Court are all unanimous on this point, and hold that the execution Court ought not ordinarily to fetter the discretion of the decree-holder to put up to sale whichever property he wishes first to sell: see *Mt. Hoolas Kooeree v. Mt. Bibee Sufechun* (1), *Mohunt Kishun Dayal Gir v. Sattar Buksh Khan* (2), *Khub Lal Singh v. Navabi Hurmuji Begum* (3), *Amir Chand v. Bukshi Sheo Persad Singh* (4) and *Midnapur Zemindury Co., Ltd.*

(1) [1867] 8 W. R. 379.

(2) [1907] 11 C. W. N. 27.

(3) [1905] 9 C. W. N. 198.

(4) [1907] 34 Cal. 13.

v. *Abinash Chndra Mitra* (5). So also was it held by their Lordships of the Allahabad High Court in *Bhikhari Das v. Dalip Singh* (6).

Under O. 34, R. 4, Civil P. C., it is the duty of the Court in making a mortgage-decree to order that the mortgaged property or a sufficient part thereof be sold. This, no doubt, gives a right to the Court making the decree to declare what portion of the mortgaged properties shall first be sold; but that discretion is not to be arbitrarily exercised and is subject to the general principle that the Court cannot prejudice the rights of the mortgagee if he has not himself done any act which prejudices the rights of those having equities against the mortgagor. It is to give effect to this principle that the provisions relating to marshalling and contribution have been enacted. In the absence of a direction in the decree to the contrary it would seem that this discretion vests in the execution Court also. The learned vakil for the appellants relies upon the following cases: *Syed Mahomed Siddik v. Ram Lal Mandar* (7), *Krishna Ayyar v. Muthukumara-sawmiya Pillai* (8), *Appya v. Rangayya* (9) and *Subraya Venkatesh v. Ganpa* (10). Some of these cases relate to contribution and do not apply to the facts of the case before us; but even in those cases it has been recognized that, as long as the right of contribution as between the mortgagor and the purchaser is unaffected by any act of the mortgagee, his right to be paid the whole of the debt out of any portion of the mortgaged property he wishes to comprise in his suit cannot be questioned. The same principle applies to the right to marshal.

Therefore, unless there are any equities requiring marshalling and contribution, the decree-holder has the fullest right to bring to sale whichever property he wishes first to sell. Here there are no such equities, and therefore the Court ought not to fetter the will of the decree-holder. But from the proceedings it would seem that the Court was fully aware of the fact that it was selling a property out of the order in which it appeared in the decree of the trial

Court, and that the Court did not choose to fetter the decree-holder's discretion. The learned vakil for the appellants contends that the Court did not direct its mind to this question, and that the judgment-debtors had no notice of the service of the sale proclamation. This ground was taken before the execution Court and was found against the judgment-debtors. It was not pressed before the District Judge, and the law does not allow any further appeal on this point. Therefore, we must take it that the sale proclamation was served in accordance with law. Then it is contended that the notice for settling the sale proclamation had not been served upon the appellants. That, too, has been found against them and the judgment of the lower Court is final on this point. Therefore, we must hold that although the Court had a discretion to settle the order in which the properties were to be sold, the Court has in this case exercised this discretion rightly and that we ought not to interfere. In this view of the case the appeal must fail and be dismissed with costs.

Jwala Prasad, J.—It appears to me that the question whether the decree-holder was entitled to sell the mortgaged property item 5 out of its order in the mortgage decree, does not properly arise in this appeal. The decree-holder in earlier execution made strenuous efforts to sell the properties in the order in which they are described in the decree, but when the properties were put up to sale, Nos. 1, 2 and 3 fetched no value. There was, therefore, no remedy left to the decree-holder but to proceed against properties Nos. 4 and 5. In the subsequent execution property No. 4 also fetched no value, and in the present execution the decree-holder, therefore, has proceeded against property No. 5. The decree-holder, while applying for the sale of item 5 clearly stated that there was no bid for the other properties at the previous sales and prayed that the property, item 5, be sold. This was allowed by the Court and hence the property was sold under the direction of the Court. It would thus appear that the order of the mortgaged properties mentioned in the decree has not been at all disturbed in execution by the decree-holder. As the question has arisen, I must say that in the beginning I had entertained some

(5) [1919] 50 I. C. 790.

(6) [1895] 17 All. 434.

(7) [1910] 7 I. C. 4.

(8) [1906] 29 Mad. 217.

(9) [1908] 31 Mad. 419 (F.B.).

(10) [1911] 35 Bom. 395=11 I. C. 989.

doubt as to the right of the decree-holder to change the order of the properties described in the mortgage bond or the decree. After carefully considering the authorities on the point I have to a great extent, if not altogether, modified my view. The right to sell the properties arises out of a contract between a mortgagor and a mortgagee as embodied in the mortgage-deed. If that deed specifically says that the properties, on default of the payment of the mortgage-money, would be sold in a particular order, I do not think it would be open to the decree-holder to change that order in seeking to enforce the repayment of his money.

If, however, there is no specific mention of the order in which the properties are to be proceeded against for the enforcement of the loan, the hands of the decree-holder would not be fettered. The mortgage decree generally follows the mortgage bond in describing the order in which the properties should be sold, unless the Court for certain reasons directs that certain properties be sold over the others. In the present case it has not been shown that there was any agreement between the parties that the properties mortgaged were to be sold in the order in which, as a matter of course, they have been mentioned in the mortgage bound. There is also no particular direction in the decree as to the order in which the properties are to be sold. The right to select the properties for the enforcement of his loan would, therefore, in the first instance be in the decree-holder. For good reasons, the Court has the undoubted discretion to direct that the discretion of the decree-holder should not prevail, and that the properties should be sold in certain other manner. It was open to the judgment-debtors or any other person affected by the sale to show that the sale of property item 5 should have been postponed until the other properties in the mortgage decree had been sold. No attempt has been made in this case to show that the right of any one has, as a matter of fact, been prejudiced by selling property No. 5 in the way in which it has been done in the present case. I therefore agree that the appeal should be dismissed.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 283

ROE AND COUTTS, JJ.

Baraik Radha Nath Singh and others
—Appellants.

v.

Davendra Nath Sahi Deo—Respondent.

Appeal No. 503 of 1917, Decided on 8th August 1918, from appellate decree of Sub-Judge, Ranchi.

Hindu Law — Debts — Father — Debt incurred to help relative—Sons are liable.

A debt not being illegal or immoral incurred by a Hindu father to help a relative, which he expects will be repaid and out of which he expects to get some benefit, is binding on his sons and they are liable for its payment. [P 284 C 1]

S. N. Palit—for Appellants.

Fakhruddin—for Respondent.

Coutts, J.—The facts of this case are not disputed and are shortly as follows: The plaintiffs are the sons of one Baraik Kashinath Singh who had an ancestral Jagir of 8 annas of village Murga. In 1891 he purchased another 5 annas so that in all he had 13 annas of the village. On 16th June 1904 he mortgaged his entire share to one Lal Jogindra Nath Sah Deo in order to raise money to pay off the debts of one Baraik Paduman Singh, whose estate was at that time being managed by the Manager of the Encumbered Estates. Jogindra Nath subsequently assigned his mortgage to Debendra Nath Sah Deo, the defendant in this case, who brought a mortgage suit and after obtaining a decree put up the property to sale and purchased it himself. He obtained a delivery of possession on 29th August 1913. Kashinath is dead and the case of the plaintiffs is that the bond executed by Kashinath was without legal necessity and was immoral and that it was executed by him without any right and they asked that the bond, the sale and the delivery of possession should not bind the plaintiffs or their property and that the plaintiffs' ancestral jagir right might be declared in the 13 annas which had been sold by Kashinath, that their possession might be confirmed and that of the defendants might be cancelled by declaring it null and void and illegal.

The learned Subordinate Judge who heard the appeal was of opinion that Kashinath expected some benefit from the loan to Baraik Paduman Singh and that the debt not being illegal or immoral it is binding on the plaintiffs who are liable for their deceased father's debts. In this

view he has dismissed the plaintiffs' suit.

The only question for consideration in this appeal is whether the plaintiffs are liable for Kashinath's debt. According to the recital in the mortgage bond executed by Kashinath the reason for lending the money is stated as follows:

"Now in consideration of the fact that Baraik Paduman Singh aforesaid is connected with us, and is a big zamindar and that as it is in every way incumbent on us to save his property, we have unanimously decided that in order to help him at this juncture we should arrange for money and pay the same to him, so that his ancestral property may be saved and we too may be benefited in future. The said Baraik will repay our money on getting possession of his properties."

It is clear then that the debt contracted by Kashinath was neither an immoral nor an illegal debt and that he expected to get some benefit from the payment of the money to Baraik Paduman Singh. The question of liability in cases of this kind has been very fully discussed in the ruling reported as *Chakouri Mahton v. Ganga Proshad* (1). At p. 869, (of 39 Cal.) the texts on the point have been summarised by Mookerjee, J., in the following passage:

"The result appears to be that the debts which a son is not under any obligation to pay may be grouped as follows: (i) debts due for spirituous liquor, (ii) debts due for lust, (iii) debts due for gambling, (iv) unpaid fines, (v) unpaid tolls, (vi) useless gifts or promises without consideration or made under the influence of lust or wrath, (vii) suretyship debts, (viii) commercial debts, and (ix) debts that are not Vyavaharika, i. e., debts that are not lawful, usual, or customary, or, if we accept the version of Colebrook, debts for a cause repugnant to good morals."

The only one of these categories under which this particular debt could possibly come would be useless gifts or debts which are not lawful, usual or customary; but it does not in fact come under either of them; because the debt was incurred to help a relative it was expected that it would be repaid and Kashinath expected that he would get some benefit out of it. The plaintiffs therefore cannot escape liability for the debt.

In this view of the case the question of whether the suit can at all lie because S. 47, Civil P. C., operates as a bar does not arise. I would dismiss the appeal with costs.

Roe, J.—I agree.

V.S./R.K.

Appeal dismissed.

(1) [1912] 39 Cal. 862=12 I. C. 699.

A. I. R. 1919 Patna 284

MULLICK AND ATKINSON, JJ.

Bansi Singh—Judgment-debtor—Appellant.

v.

Sheonandan Thakur and others—Decree-holders—Respondents.

Appeals Nos. 42 and 44 of 1919, Decided on 23rd July 1919, from original orders of Dist. Judge, Durbhanga.

Bengal Land Revenue Sales Act (1889), S. 34—S. 34 does not apply to suit by third party against auction purchaser at revenue sale.

Section 34 applies merely to the case of an owner who has committed default in payment of the revenue rent of his property and who, subsequently, by a suit succeeds in setting aside the sale held under that Act, and who has applied for and withdrawn the surplus purchase money lodged in the Collectorate under such sale for his own benefit. [P 285 C 2]

The section has no application to a suit instituted by a third party against an auction-purchaser at a revenue sale, e. g., a suit by the reversioners, in respect of a claim for relief not provided by the Act itself. [P 286 C 1]

L. N. Singh, Sambhu Saran and Jau-bans Sahay—for Appellant.

Naresh Chandra Sinha and Nitai Chandra Ghose—for Respondents.

Atkinson, J.—Lalji Thakur died childless possessed of an estate situate in Mauza Sembhuar. Upon his death he was succeeded by his mother, Mt. Phani Thakurain, who thereupon became entitled to a Hindu widow's estate therein. During her possession of the estate as a Hindu widow, she allowed the revenue rent due and payable to Government to fall into arrear. The estate to which Mt. Phani Thakurain succeeded was a revenue rent paying estate. The actual amount due for arrears of revenue was the sum of Rs. 6 odd; and the actual amount thereof in respect of which default was committed and for which the property was sold was Re. 1-4-0. The property was sold by the Collector on 5th June 1911 in pursuance of the powers vested in him under the Revenue Sales Act of 1859, and was purchased by the judgment-debtor before us, viz., Bansi Singh, who paid for the property sold the sum of Rs. 1,300 odd. The plaintiffs as reversionary heirs of Lalji Thakur instituted the original suit connected with these miscellaneous appeals, claiming a declaration that the sale effected by the Collector as aforesaid under the Revenue Sales Act was invalid and inoperative to

bind the reversioners, on the ground that Mt. Thakurain, the mother of the last male owner, had conspired with others, including the purchaser, to fraudulently force the property to be sold in defeasance of the rights of the plaintiffs. The case came on for beharing and was tried by the learned District Judge of Darbhanga; and the learned District Judge decreed the suit in favour of the plaintiffs, granting them the declaration which they sought by the prayer of their plaint.

From the decision of the learned District Judge an appeal was preferred to the High Court, and this Court by its order of 17th August 1916 reversed the decree granted by the learned District Judge and held that the property then in suit was not fraudulently brought to sale by Mt. Phani Thakurain and others acting jointly with her. Subsequently, however the High Court was asked to review its previous order or decision, dated 17th August 1916; and upon review two of our learned brothers of this Court were pleased to direct, by their order dated 4th April 1918, that the appeal presented to the High Court should be dismissed, which in effect operated to restore the decree pronounced by the learned District Judge, granting the plaintiffs the relief claimed by them. Pending the appeal, Mt. Phani Thakurain died. By the order pronounced by this Court, dated 17th August 1916, the plaintiffs were obliged to lodge in Court the costs awarded against them by that order. This the plaintiffs did and the amount for costs so lodged by the plaintiffs was withdrawn by Bansi Singh who was the auction purchaser as aforesaid at the revenue sale. It is necessary to observe that the sale effected by the Collector was never impeached on any ground specified by the Revenue Sales Act, so that the sale so effected by the Collector was binding and operative.

After the High Court's order of 4th April 1918 an application was made to the learned District Judge by the plaintiffs seeking to have restored to them the amount of costs which they deposited in Court by the direction of this Court's order, dated 17th August 1916, which money was withdrawn by Bansi Singh. This application is covered by Miscellaneous Appeal No. 44 of 1919. A second application was also made by the plaintiffs seeking to execute as against Bansi

Singh, the auction-purchaser, the decree for the amount of costs to which the plaintiffs became entitled as a result of the litigation terminating in their favour. The learned District Judge by his order, dated 4th January 1919, rejected the contention put forward on behalf of the judgment-debtor and acceded to the application presented on behalf of the plaintiffs and directed restitution of the moneys which Bansi Singh had withdrawn from Court as and for costs; and the learned Judge also gave the plaintiffs permission to execute their decree for costs in respect of the costs incurred not only in the High Court but also in the Subordinate Courts as against Bansi Singh. From the order of the learned Judge two miscellaneous appeals have been preferred before us.

The contention is that by virtue of S. 34, Revenue Sales Act 11 of 1859, the plaintiffs are not entitled to the relief which they now seek. It is necessary to state that when Bansi Singh, the auction purchaser, deposited in the Collectorate the amount due by him as the purchase money in respect of his purchase of the estate sold, Mt. Phani Thakurain withdrew the money so lodged in the Collectorate and applied the same for her own use; and, so far as can be gathered, no portion of such moneys ever reached the hands or possession of the plaintiffs. It is contended that, by reason of this payment into the Collectorate by Bansi Singh and the withdrawal of the moneys so lodged by him by Mt. Phani Thakurain, the plaintiffs are not entitled to seek or ask for restitution of the amount for costs paid into Court by them and withdrawn by Bansi Singh, unless and until the plaintiffs reimburse the purchaser the amount of the surplus purchase moneys which the mother of the last male owner withdrew from the Collectorate. With that contention we cannot agree. S. 34, Revenue Sales Act, has in our opinion, no application to the facts of this case at all. It applies merely to the case of an owner who has committed default in payment of the revenue rent of his property, and who subsequently by a suit succeeds in setting aside the sale held under the Revenue Sales Act, and which owner has applied for and withdrawn the surplus purchase money lodged in the Collectorate under such sale for his own benefit.

Section 34 provides that, in such event if the owner on default of the payment of Government revenue seeks to be restored to his own property on the sale being set aside, on any of the grounds specified in the Act itself, he must refund to the purchaser whatever moneys belonging to the purchaser he has acquired for his own benefit, and the section prescribes a limit of six months within which time such refund must be made. Obviously S. 34, Act 11 of 1859, has no application to a suit instituted by third parties against an auction-purchaser at a revenue sale such, for example, as the reversioners in this case, in respect of a claim for relief not provided by the Act itself. Accordingly S. 144, Civil P. C., is the section which governs the rights of the parties in the present application, and clearly this is a case in which restitution ought to be made to the plaintiffs of the amount for costs which they deposited under the order of this Court and which Banshi Singh duly withdrew. Therefore with regard to the decision of the learned District Judge in Miscellaneous Appeal No. 44, we agree that his finding in law and fact was right. With regard to Miscellaneous Appeal No. 42 we fail to see on what principle the plaintiffs should not be entitled to recover from the judgment-debtor, Banshi Singh, the costs to which they are properly entitled by reason of their success in the litigation which they instituted, and in which Banshi Singh was substantially defeated.

It is contended that the order of this Court made on 4th April 1918 is silent as to any award in respect of costs incurred in the lower Court; but inasmuch as the order of this Court, dated 4th April 1918, was an order of affirmance, and the appeal was dismissed with costs, it clearly, in our opinion, was intended that the costs in all Courts should follow as a matter of right on the successful event and be awarded to the plaintiffs. Therefore we see no reason in law or principle why the plaintiffs should not be entitled to reap the full fruits of their victory. Accordingly we dismiss both these appeals with costs, measured at five gold mohurs to cover both cases.

Mullick, J.—I agree.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 286

JWALA PRASAD AND ATKINSON, JJ.

A. J. Meik—Judgment-debtor—Appellant.

v.

The Midnapur Zemindary Co. Ltd.—Decree-holder—Respondent.

Misc. Civil Appeals Nos. 216 and 229 of 1918, Decided on 29th May 1919, from orders of Sub-Judge, Manbhum, D/- 11th May 1918.

(a) Civil P. C. (5 of 1908), O. 21, R. 16—Joint decree cannot be executed by one in respect of his share or whole decree—When whole decree allowed to be executed on behalf of and for benefit of all, Court should impose conditions for protection of others not applying.

A joint decree cannot be executed by one of the several joint decree-holders in respect of what the applicant considers his share in the decree. Much less can it be executed by one of the decree-holders in respect of the entire decree, unless it is on behalf of the decree-holders for the benefit of them all. Even if the application for execution of the decree by one of the decree-holders be on behalf of or for the benefit of them all, it is for the Court to allow, for sufficient cause, the execution of the decree on such application, and in case the Court does allow the application and the decree to be so executed, the Court is required to make such order "as it deems necessary for protecting the interests of the persons who have not joined in the application." [P 287 C 2; P 288 C 1]

(b) Civil P. C. (5 of 1908), O. 21, Rr. 11, 15 and 17—Though application can be allowed to be amended to meet requirements of Rr. 11 to 14 it cannot be done in case of R. 15.

The requirements of R. 15, O. 21, go to the root of the execution of the decree itself, and therefore while R. 17 of the order empowers an executing Court to allow a defect in the requirements of Rr. 11 to 14 of the order to be amended it does not include R. 15 of the order, so that an application for execution of a decree which does not comply with the requirements of R. 15 cannot be allowed to be amended. [P 288 C 1]

Fakhruddin—for Appellant.

Hasan Imam and *S. N. Palit*—for Respondent.

Jwala Prasad, J.—Miscellaneous Appeals Nos. 216 and 229 of 1918 are presented against the orders of the Subordinate Judge, dated 11th May 1918 and 6th July 1918 respectively. By these orders the Subordinate Judge disallowed the several objections of the judgment-debtor, Mr. A. J. Meik, Manager of Barabhum Encumbered Estate, Manbhum, to the execution of a joint decree held by the respondent, the Midnapur Zemindary Co. Ltd. and one Mr. Mathesa against the appellant. The facts shortly stated are as follows:

The Raja of Barabhum, Sri Ramkanai Singh Deo, brought a Suit No. 89 of 1906, against the respondent, the Midnapur Zemindary Company, for setting aside a Patni. The Subordinate Judge dismissed the suit and awarded costs to defendants the Midnapur Zemindar Company and Mr. Mathesa. The Raja preferred an Appeal No. 79 of 1908, to the Calcutta High Court which was also dismissed on 28th April 1910 with costs. During the pendency of the appeal in the High Court the Raja, on 17th December 1909, obtained a decree against the Midnapur Zemindary Company for a large sum of money due as arrears of Patni rent. The Deputy Commissioner of Manbhum, as Manager of the Encumbered Estate of the Raja, obtained leave to appeal to His Majesty in Council against the decree of the Calcutta High Court, dated 28th April 1910, in favour of the Midnapur Zemindary Company, and on 7th February 1911 hypothecated the said rent decree of 17th December 1909 in favour of the Raja as security for the respondent's costs of appeal to the Privy Council. An appeal was preferred. In February 1915, the Privy Council dismissed the appeal awarding costs to the defendants, the Midnapur Zemindary Company and Mr. Mathesa. Out of the two decree-holders the Midnapur Zemindary Company and Mr. Mathesa, only the former applied for execution of the entire decree to the Subordinate Judge on 23rd June 1917. The execution comprises three decrees for costs:

(1) For costs awarded by the Subordinate Judge in Suit No. 89, Rs. 1,701-9-0 which with interest and costs of the previous executions amounted to Rupees 2,686-1-6. (2) For costs awarded by the High Court in Appeal No. 79, Rupees 2,008-6-0, which with interest and costs of the previous executions amounted to Rs. 2,873-0-3. (3) For costs awarded by His Majesty in Council in Appeal No. 62, Rs. 5,814-12-0.

The total sum covered by the execution is Rs. 11,573-13-9. The decree-holder applied for recovery of the money by attachment and sale of the judgment-debtor's zamindari right in Barabhum Estate Pargana, Tauzi No. 1, District Manbhum. The Deputy Commissioner, as manager of the estate of the judgment-debtor under the Chota Nagpur Encumbered Estates Act, filed a petition objec-

ting to the execution of the decree on 15th August 1917. This was disposed of against the judgment-debtor by the Subordinate Judge on 11th May 1918, and the execution was ordered to proceed. Appeal No. 216 is against this order of the Subordinate Judge. On 29th June 1918, the judgment-debtor filed further objections which were disposed of by the order of the Court on 6th July 1918. Appeal No. 229 is by the judgment-debtor against this order of the Subordinate Judge. These two appeals may be considered at one and the same time and may be disposed of by one judgment as they relate to the execution of the same decree, and the objections of the judgment-debtor are more or less overlapping.

Mr. Fakhrudin, appearing on behalf of the appellant, has strenuously contended that the petition for the execution of the decree was invalid inasmuch as it contravened the provisions of O. 21, R. 15. The petition for the execution of the decree was taken out by one of the two joint decree-holders in respect of the whole decree. Under R. 15 of the said order this is permissible if the execution is for the benefit of all the decree-holders. The petition for execution of the decree, dated 23rd June 1917, does not state that the execution was for the benefit of all the decree-holders. The name of the other decree-holder—Mr. Mathesa—is not even mentioned in the column prescribed for stating the names of the parties nor anywhere else in the application. It is therefore clear that the execution was taken out by the Midnapur Zemindars Co. Ltd., one of the decree-holders only, in respect of the entire decree solely on its own behalf. A joint decree cannot be executed by one of the several joint decree-holders in respect of what the applicant considers his share in the decree. Much less can it be executed by one of the decree-holders in respect of the entire decree unless it is on behalf of all the decree-holders or for the benefit of them all. Even if the application for execution of the decree by one of the decree-holders be on behalf of or for the benefit of them all it is for the Court to allow, for sufficient cause, the execution of the decree on such application, and in case the Court does allow the application and the decree to be so executed the Court is required to make such order

"as it deems necessary for protecting the interests of the persons who have not joined in the application."

This is imperative in order to make an execution of a decree by one of the joint decree-holders valid and competent, as the word "shall" in Cl. 2 indicates. In the present case there is no application for the execution of the joint decree for the benefit of all the joint decree-holders; nor has the decree been allowed to be executed by one of the decree-holders, nor has the Court passed any order for protecting the interest of the other decree-holder who has not joined in the application. The execution therefore is invalid and incompetent. The Court below disposed of this objection by its order, dated 11th May 1918, by simply stating that "O. 21, R. 15, Civil P. C, enables one of the joint decree-holders to execute the whole decree:" vide O. 20, dated 11th May 1918. The lower Court has overlooked the provisions of the said rule. On behalf of the respondent it has been suggested that the application may be allowed to be amended. R. 17, O. 21, while it empowers the Court to allow a defect in the requirements of Rr. 11 to 14 to be amended, does not include R. 15 in it and hence the application cannot be allowed to be amended. There appears to be good reason for the said distinction. The defects in the requirements under Rr. 11 to 14 are only of formal character, whereas R. 15 goes to the root of the execution of the decree itself. The contention of the judgment-debtor must therefore prevail and it must be held that there was no valid application for execution of the decree before the lower appellate Court and the same must therefore be disallowed.

The objection as to the execution being invalid under O. 21, R. 15, has been taken in Appeal No. 216 which relates to the order of the Court of 11th May 1918, and not in Appeal No. 229 which relates to the order of the Court of 6th July 1918. But inasmuch as the petition for execution of the decree was in itself invalid, the orders of the Court of 11th May directing execution to proceed and of 6th July directing notice to issue under O. 21, R. 66, are illegal and must therefore be set aside.

It is needless to consider the other points raised in both these appeals and we therefore abstain from giving any

opinion on those points. The result is that the appeals are allowed with costs. We assess the hearing fee at five gold mohurs for both the appeals.

Atkinson, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 288

ROE AND COUTTS, JJ.

Keshab Singh—Plaintiff — Appellant.

v.

Bansi Singh — Defendant — Respondent.

Appeal No. 30 of 1916, Decided on 28th March 1919, from original decree of Sub-Judge, First Court, Muzaffarpur, D/- 8th December 1915

(a) **Mahomedan Law—Pre-emption — Perfect partition of estate—Right of pre-emption on ground of common appurtenances does not exist.**

When there has been a perfect partition of an estate and separate mahals with separate tauzi numbers are formed, although certain properties, such as wells, roads, tanks, etc., are left undivided, no right of pre-emption on the ground of common appurtenances exists. [P 289 C 2]

(b) **Mahomedan Law — Pre-emption—"Appurtenances"—Meaning explained.**

The term "appurtenances" means facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. Roads, wells, tanks, rent-free land occupancy holdings, etc., left undivided on the partition of an estate are not appurtenances. [P 289 C 2]

Sultan Ahmad and Chandar Sekhar Banerjee—for Appellant.

Lachmi Narain Sinha, Nirsu Narain Sinha and Aghor Nath Chatterji — for Respondent.

Roe, J.—In this case the appellant is dissatisfied with a decree of the Court of the Subordinate Judge of Muzaffarpur dismissing his suit upon a claim to pre-emption. The facts of the case upon investigation appear clearly to be as follows :

The property sold was a separate touzi number formed by partition from a parent estate. The plaintiff was the owner of another mahal formed by the same partition from the same parent estate. The majority of the lands had been divided, but joint between the parties were left a well, certain roads, a tank, a number of brahmottar and fakirana holdings and two holdings stated in the schedule of lands left common to be occupancy holdings. The learned Subordinate Judge found that the mere creation of a separate estate severed completely all con-

nexion between the plaintiff and the vendor of the share sold, and upon this ground alone, without entering into the question whether the ceremonies necessary to pre-emption had been performed, dismissed the suit. In appeal to this Court it is urged that the partition in question was not necessarily a complete partition, and that therefore before the Subordinate Judge could say that there were no lands of the parent mahal left undivided, evidence should have been taken as to whether the plaintiffs were in fact cosharers in benefits to be derived from lands left undivided between the parties. On the other side it is urged that the point has been settled by concurrent decisions of the Courts of Allahabad and of Calcutta, beginning in the Allahabad Court from the case of *Maya Ram v. Lachho* (1) and in the Calcutta Court from *Lala Puriag Dutt v. Shaikh Bundah Hossein* (2). The facts of the latter case are somewhat different from the case before us, for in the body of the judgment it is distinctly stated that everything which was worth dividing was divided and the parties only remained jointly interested in what was either utterly worthless or more probably was treated as public property in the same way as roads. The Allahabad case however is directly in point. It was taken on appeal to the Judicial Committee *Lachho v. Maya Ram* (3). Their Lordships state the law to be as follows:

"Now whether the thok comprised the divided lands, which were recorded as belonging to Ibrahim alone, or included the undivided lands which were appurtenant to those divided lands, the plaintiff was no co-owner with Ibrahim. She was not a joint tenant, nor a tenant-in-common with him as to the divided portion of the lands; if she were a tenant-in-common of the undivided lands, that did not make her an owner of Ibrahim's share in those lands. A tenant-in-common is the owner of his own share; but he is not an owner of the other tenant-in-common's share. It appears therefore to their Lordships that the plaintiff was not an owner of the thok which was sold.

This disposes of the plaintiff's contention that he was sharik or co-owner in the mahal sold. It is contended however on behalf of the appellant that if his claim as a sharik fails, he is still entitled to come in as a pre-emptor in the second degree or khalit, that is, one who

is a sharer in the appurtenances of the estate. But it cannot be said that the roads or the well, or the tank or the rent-free land or the occupancy holdings left undivided were appurtenances to the mahal. By the term appurtenances is meant facilities or amenities peculiar to the owner of an estate but derived not from the estate itself but by easement from the estate of another. In the case before us the roads and well, etc., which the plaintiffs ask us to regard as appurtenances to the mahal are not part of the estate of another. Common tenancy in these roads and wells is not an appurtenance to the plaintiffs' estate, but actually a part of it. I would dismiss this appeal with costs.

Coutts, J.—The principal ground for allowing the plaintiffs the right of pre-emption, which is urged before us, is that the plaintiffs have a right as shafikhali or cosharers in the appurtenances of the estate, and the decisions in *Mahtab Singh v. Ram Tahal Misser* (4) and *Jahangeer Buksh v. Bhickaree Lall* (5) are principally relied on. Neither of these cases however assist the appellants, for in both cases the parties were not owners of separate mahals but of separate pattis, and there was no perfect partition. In the present case however although some portions of the original mauza were not partitioned, there was a complete partition and separate mahals with separate tauzi numbers were formed. This matter has been fully discussed in *Abdul Rahim Khan v. Kharag Singh* (6) and *Munna Lal v. Hajira Jan* (7). The first of these cases is exactly in point, and in both these cases it was held that when there has been a perfect partition, although certain properties—a village chaupal, wells, tanks, and such other properties—were left undivided, no right of pre-emption on the ground of common appurtenances existed. The test appears to be whether or not there has been a perfect partition. The formation of separate mahals with separate tauzi numbers is clear indication of such a partition, and I agree that this appeal must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

(1) [1878-80] 2 All. 631.

(2) [1871] 15 W. R. 225.

(3) [1883] 5 All. 153=10 I. A. 1=4 Sar. 405 (P.C.).

(4) [1868] 10 W. R. 314.

(5) [1869] 11 W. R. 71.

(6) [1892] 15 All. 104.

(7) [1911] 33 All. 20=7 I. C. 404.

A. I. R. 1919 Patna 290 (1)

DAS, J.

Thakur Singh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 78 of 1919, Decided on 7th April 1919, against order of Sess. Judge, Gaya, D/- 10th March 1919.

Criminal P. C. (5 of 1898), S. 367—Provisions laid down in S. 367 must be complied with.

An accused person is entitled to have an independent judgment of the trying Court, and such judgment must be prepared in accordance with, and contain the particulars required by, S. 367, otherwise it is no judgment at all.

Where a Second Class Deputy Magistrate, thinking that a severer punishment should be inflicted on the accused than what he was authorized to award under the Code, recorded his full opinion and forwarded the proceedings under S. 349 to the Sub-Divisional Magistrate, and the latter convicted the accused and wrote the following judgment, "I have perused this judgment, I agree with the findings arrived at by the learned trying Magistrate and convict all the eleven accused persons for being members of an unlawful assembly with the common object of committing theft as stated in the charge."

Held, that upon the test laid down by S. 367 this was not a judgment at all. [P 290 C 1,2]

A. Majid and Jitendranath Sen Gupta—for Petitioners.

Manohar Lall—for the Crown.

Judgment.—The petitioners were tried before a Deputy Magistrate having Second Class powers, under Ss. 143 and 319, I. P. C. The learned Deputy Magistrate thought that a severe punishment should be inflicted on the petitioners than what he was entitled to inflict under the Code. In this view he recorded a very full opinion and under S. 349, Criminal P. C. he submitted his proceedings to the Sub-Divisional Magistrate to whom he was subordinate. The Sub-Divisional Magistrate in his judgment says only this:

"I agree with the findings arrived at by the learned trying Magistrate and convict all the 11 accused persons for being members of an unlawful assembly with the common object of committing theft as stated in the charge."

It is argued before me that this is not a judgment at all. I agree with this contention. S. 367, Criminal P. C. says what a judgment is, and it is quite clear to me that if the test laid down by S. 367 is to be applied, the judgment of the Sub-Divisional Magistrate is not a judgment at all. The matter came up before the Sessions Judge of Gaya. He

agreed with the contention that the judgment of the Sub-Divisional Magistrate was not a judgment at all, but he thought that the accused were not prejudiced and he therefore refused to interfere. In my opinion the petitioners were entitled to have the independent judgment of the Sub-Divisional Magistrate and I therefore remand the case to the Sub-Divisional Magistrate of Aurangabad for disposal according to law. The Sub-Divisional Magistrate will hear the parties before he proceeds to write out a judgment in the case. The petitioners will remain on the present bail until they furnish fresh bail to the satisfaction of the District Magistrate of Gaya.

V.S./R.K.

*Case remanded.***A. I. R. 1919 Patna 290 (2)**

DAS, J.

Ram Prosad Roy—Appellant.

v.

Kirit Roy—Applicant—Respondent.

Appeal No. 138 of 1919, Decided on 22nd July 1919, from appellate order of Sub-Judge, Saran.

Civil P. C. (5 of 1908), O. 21, R. 2 (3)—Evidence of whether payment is certified or not can be gone into—Payment may be certified but not recorded.

A Court executing a decree is entitled to go into evidence for the purpose of considering whether the decree-holder has certified satisfaction of the decree. O. 21, R. 2, Cl. (3) enables a Court to recognize a payment or adjustment which has been certified but not recorded. [P 291 C 1]

Jalgebind Prasad Sinha—for Appellant.

Harnarayan Prasad—for Respondent.

Judgment.—The only question argued before me is whether under S. 47, Civil P. C., the Court can investigate the question whether the fact of satisfaction of a decree was certified to the Court by the decree-holder. In this case the appellant obtained a decree against the respondent. He put that decree in execution when he was met with the plea by the respondent that the decree was satisfied and the fact of the satisfaction of the decree was certified to the Court by the decree-holder. The petition put in by the decree-holder is not forthcoming and the explanation is that it was either misplaced by the Court amlas or that the decree-holder may have had something to do with it. The lower appellate Court has on evidence come to the conclusion

that the decree-holder did certify the fact of the satisfaction of the decree to the Court and that therefore execution cannot proceed. The learned vakil on behalf of the decree-holder urges that the Court should not have gone into that question at all and that sub-S. 3, O. 21, R. 2, prevents the Court executing a decree from recognizing any payment or adjustment which has not been certified or recorded.

The scheme of O. 21, R. 2, is not very complicated. First of all there is an obligation on the decree-holder to certify the payment or adjustment to the Court, whose duty it is to execute the decree, and there is also an obligation on the Court to record the same accordingly. Next, if the decree-holder does not certify to the Court, then the section gives power to a judgment-debtor to bring that fact to the notice of the Court, and it gives power to the Court to investigate that matter, and if the Court finds that there were such payments as alleged by the judgment-debtor, the Court has power to record the same accordingly. Lastly, it imposes a bar upon a Court executing the decree from recognizing a payment or adjustment which has not been certified or recorded as aforesaid. In my opinion the Court may recognize a payment or adjustment which has been certified but not recorded. It seems to me that sub-S. 3 is perfectly clear on this point. Therefore the position is that the Court finds on an investigation of facts that the decree-holder did certify the fact of such payment to the Court, although it was not recorded by the Court. In my opinion the Court was entitled to go into evidence for the purpose of considering whether the decree-holder did certify the fact of such payment to the Court. The finding of fact that the decree-holder did certify such payment to the Court is binding on me in second appeal, and I hold that the Court may recognize such payment although it has not been recorded by the Court. I would therefore dismiss this appeal with costs, which I assess at one gold mohur.

V.S./R.K.

*Appeal dismissed.***A. I. R. 1919 Patna 291**

JWALA PRASAD, J.

Ram Ran Vijai Singh—Defendant—Appellant.

v.

Mt. Bibi Wazirunnissa and others—Plaintiffs—Respondents.

Appeals Nos. 724, 776, 777 and 778 of 1917, Decided on 8th January 1919, from appellate decree of Dist. Judge, Patna.

Bengal Tenancy Act (1885), S. 88—Transfer of portion of holding without landlord's consent is not binding on landlord—He can sue for declaration that it is not binding under Specific Relief Act (1877), S. 42.

Under S. 88, Bengal Tenancy Act, a landlord is not bound to recognize a division of a tenure or holding, or a distribution of the rent payable in respect thereof unless it is made with his express consent in writing. It is also well settled that a transfer of a portion of a holding without the landlord's consent is not binding upon him. These rights of the landlord arise out of his ownership in the property. A transfer of a portion of an occupancy holding without the landlord's consent is an attempt to infringe those rights or to throw clouds upon them, so that a landlord is entitled to sue for a declaration that such a transfer is not binding upon him.

[P 292 C 2]

Kulwant Sahay and Siveshwardayal—for Appellant.

Ranchanan Banerji for Fakhruddin—for Respondents.

Judgment.—These appeals arise out of four different suits. The appellant is defendant in all these four suits. He purchased portions of four holdings, which belonged respectively to the defendants other than defendant 1 in each of the four suits. The plaintiffs sought in these suits a declaration that the transfers of the portions of the holdings in favour of the appellant by the tenants were without their consent and as such were not binding upon them. There was also originally a prayer for a declaration that the said transfers were illegal, ineffective and inoperative as against the plaintiffs because there was no custom or usage of transferring a kasht without the consent of the proprietors or the maliks. The appellant as well as the other defendants filed written statements, resisting the claim of the plaintiffs and asserting that there was custom of transferability of raiyati kasht without the consent of the zamindars, and also that the transfers in favour of the appellant were recognized by the plaintiffs. Originally several issues were framed in the case, but at the trial the parties gave up the issues relating to the custom of trans-

ferability of occupancy holdings without the landlord's consent and the recognition of the transfers in suit by the landlord. The principal issue tried in the suit was issue 4, which after amendment stood as follows:

"Whether the sale deeds in suit are valid and operative against the plaintiffs."

Both the Courts below decided this issue in favour of the plaintiffs and gave the declaration to the plaintiffs in all the four suits upon the finding that the transfers in question were without the landlords' consent and were not binding upon the plaintiffs. This finding is not disputed. It is conceded that the plaintiffs are not bound by the transfers. It is however contended on behalf of the appellant, the transferee of the portions of the holdings, that under S. 42, Specific Relief Act, the plaintiffs are not entitled to the declaration given to them by the Courts below. The Calcutta rulings are against this contention: vide *Bansi Das v. Jogdip Narain Chowdhry* (1) and *Sheik Gozoffur Hossein v. E. Dabli* (2). In both these cases their Lordships granted the declaration sought by the plaintiffs that the holding was not transferable and that the alienation of a portion thereof was invalid and not binding upon the landlord. In the case of *Rai Kamaleswari Persad Singh Bahadur v. Maharaja Harbullabh Narain Singh Bahadur* (3) similar was the observation of Mookerji, J. Apart from the aforesaid authorities I am of opinion that the Courts below were right in giving the plaintiffs the declaration sought in the suits. It is true that in a suit for a declaration the plaintiff, under S. 42, must prove that he has a present existing interest in the property and that the defendant has done some act which is hostile to and invades that right of the plaintiff. In other words, some cloud must be cast upon the title of the plaintiff before he can ask for its removal: vide *Kenaram Chuckerbutty v. Dinonath Panda* (4) and *Deokali Koer v. Kedar Nath* (5). In the latter case the history of the enactment of S. 42, Specific Relief Act 1 of 1877, has been lucidly set forth. In the present case the sale deeds expressly declare that the transferees shall

be entitled on the basis of the documents, to have their names registered in the sherista of the landlords. A landlord is not bound to recognize a division of a tenure or holding, or a distribution of the rent payable in respect thereof unless it is made with his express consent in writing under S. 88, Bengal Tenancy Act.

It has also been well settled that a transfer of a portion of the holding without the landlord's consent is not binding on him. The aforesaid rights of the landlord arise out of his ownership in the property. The transfer of a portion of an occupancy holding without the landlord's consent is therefore an attempt to infringe those rights, or to throw clouds upon them. The deeds in question purport to create a right in the transferees antagonistic to that of the plaintiffs and may in future serve as an evidence of such a right against the landlord. It is upon this principle that a person is entitled to have a declaration that a decree in a suit to which he is not a party is collusive and not binding upon him, if it relates to any property in which that person has an interest. The observations of the Court in *Bromley v. Holland* (6) quoted in *Gandla Pedda Naganna v. Sivanappa* (7) appears entirely to apply to the present case. The instruments of sale in favour of the appellant may be used to the prejudice of the landlords. It is obvious from the pleadings in this case that the appellant was not only interested in denying the right of the plaintiffs to refuse the recognition of the transfers, but he expressly denied the plaintiffs' right in the written statement and went so far as to say that the plaintiffs had recognized his transfer. In the words of Sir Asutosh Mookerji, J., in *Harendra Lal Rai Chowdhury v. Nawab Salimullah Bahadur* (8)

"the defendant, if he had no interest to deny the title of the plaintiff, may have defeated the action by a declaration that he had neither denied nor was interested to deny the right which the plaintiff sought to establish."

The appellant was interested in denying the right of the plaintiffs to refuse the recognition of the transfer and as a matter of fact he did deny. There can therefore be no doubt that there was a threatened invasion of the right of the

(1) [1897] 24 Cal. 152.

(2) [1897] 1 C. W. N. 162.

(3) [1905] 2 C. L. J. 369.

(4) [1868] 9 W. R. 325.

(5) [1912] 39 Cal. 704=15 I. C. 427.

(6) [1802] 7 Ves Jur 3.

(7) [1915] 38 Mad. 1162=26 I. C. 232.

(8) [1910] 7 I. C. 21.

plaintiffs in the holdings in question. I therefore overrule the contention of the learned vakil on behalf of the appellant, and confirm the decree of the Courts below. The appeal is accordingly dismissed with costs.

V.S./R.K. *Appeal dismissed.*

*** A. I. R. 1919 Patna 293**

MULLICK AND JWALA PRASAD, JJ.

Kamla Prasad—Plaintiff—Appellant.
v.

Ram Chandra Prasad Narain Singh and others—Defendants—Respondents.

First Appeal No 239 of 1917, Decided on 23rd May 1919, from decision of Sub-Judge, Muzaffarpur.

(a) Contract Act (1872), Ss. 16 and 74—Power of Court to relieve interest is limited—Interest.

The Courts in India are precluded from relieving a debtor with regard to interest, unless the case comes within the purview of S. 16 or S. 74, Contract Act. [P 297 C 1]

*(b) Contract Act (1872), S. 74—Compound interest—Interest not varied for default—S. 74 has no application.

Where a bond provides for payment of interest at a certain rate with yearly rests and does not stipulate for payment of an increased rate from the date of default in payment nor does it in any way vary the rate of interest on account of such default, S. 74 has no application to the case. [P 295 C 2]

B. C. Sinha and Murari Prasad—for Appellant.

L. N. Singh, G. C. Pal, Sant Prasad, T. N. Sahay and L. K. Jha—for Respondents.

Jwala Prasad, J.—This appeal arises out of a suit brought by the plaintiff Kamla Prasad for recovery of Rs. 61,452 on foot of a mortgage bond, dated 31st August 1903, executed by one Jamuna Prasad in favour of the plaintiff's father Pokhar Mal, who died in Jaith 1319 (1912) leaving the plaintiff as his sole surviving heir.

The bond purports to have been signed and executed by Jamuna Prasad for himself and as guardian of his brother defendant 2, who was then a minor, hypothecating the entire joint family property. The consideration of the bond is said to be to pay off Rs. 174 4-0 due to the plaintiff's father Pokhar Mal under two hand notes, Rs. 1,182-8-3 due to him on Bahi Khata account Rs. 753-7-3 in cash to Jamuna Prasad to meet the household expenses of the joint family and Rupees 1,886-12-6 to be deposited by the mortgagee in Court in satisfaction of a decree

of one Gajadhar Prasad Sahu in execution of which the family property was advertised for sale on 1st September 1903. The total amount of consideration thus came to Rs. 4,000, for which the bond in question was executed. The due date for the payment of the money secured was 30th Baisakh 1311 and the interest stipulated for in the bond was at the rate of 24 per cent. per annum and compound interest with yearly rests. The original debt of Rs. 4,000 with interest and compound interest came to Rs. 61,452 on the date of the suit, 28th April 1916. The plaintiff seeks to recover the said amount by sale of the mortgaged property.

Jamuna Prasad, the executant of the bonds, is dead. Defendant 1 is his son and defendant 2 is his brother. Defendant 3 is the mother and defendant 4 is the widow of Jamuna Prasad. Defendants 3 and 4 hold some of the mortgaged property in lieu of their maintenance. The defendants third party (Nos. 5 to 16) are the subsequent purchasers of some of the property in suit and the defendants fourth party, Nos. 17 to 28, are puisne mortgagees in respect of some of the property. Defendants 1, 5, 7, 13, 15, 18 and 23 filed separate written statements. Out of these defendants, only Nos. 1, 4, 5 and 18 appear to have contested the suit in the Court below. The other defendants did not enter appearance in the Court below. Respondents-defendants 1, 4, 5, 7, 17 and 18 filed Vakalat-namas in this Court but only defendants 5 and 18 contested the appeal at the time of its hearing.

Defendant 1, son of the original mortgagor Jamuna Prasad, denied execution of the bond and payment of the consideration. He alleged that Jamuna Prasad owed no money to Pokhar Mal on hand-notes and Kahi Khatas and that no money was due to Gajadhar Prasad under a mortgage decree, that there was no family necessity for borrowing money, that Jamuna Prasad was a man of vicious habits and the debt was contracted for immoral purposes. He also stated that the plaintiff was a minor and an idiot and could not maintain the suit without a next friend and without impleading Sri Ram, Takur Das, Kishen Lal and Moti Lal, who were joint with his father Pokhar Mal as party to the action. He also pleaded limitation.

The pleas taken by the other defendants in the written statements are more or less the same as those taken by defendant 1. In addition, some of the defendants (5, 7, 13, 15 and 18) asserted that, even if the debt contracted by Jamuna Prasad be good and valid, the properties purchased or held in mortgage by the defendants could not be made liable for the claim on the plaintiff.

It would thus appear that the defendants in their written statement resisted the plaintiff's claim on all conceivable grounds. The pleas taken by them gave rise to eight issues. All these issues, except issue 4, were decided by the Subordinate Judge against the defendants. The learned Subordinate Judge held that the bond was duly executed by Jamuna Prasad for self and as guardian of his minor brother, defendant 2, for valuable consideration and for legitimate purposes of the joint family of which he was the karta, and that the debt was not contracted for any illegal or immoral purposes. He further held that there was no substance in the defendants' pleas in bar of the suit, namely, that the plaintiff was not entitled to institute the suit being a minor and an idiot, or that the court fee paid was not sufficient, or that there was any nonjoinder of parties, or that the suit was barred by limitation.

The Court however decided issue 4, which related to the rate of interest claimed by the plaintiff, against him and reduced his claim from Rs. 61,452 to Rs. 10,636 11-6. The plaintiff has therefore appealed to this Court and contends that he is entitled to the entire sum claimed by him as the amount arrived at by calculating interest at the rate and in the manner stipulated for in the bond. The defendants have not appealed to this Court against the decision of the Subordinate Judge upon the other issues, nor is there any cross-objection by them attacking the findings of the Subordinate Judge on those issues. This appeal is therefore directed solely against the decision of the Subordinate on issue 4, which runs as follows: "Is the interest mentioned in the bond excessive and by way of penalty?"

The finding recorded by the Court below is rather summary and runs as follows:

"In the present case Jamuna Prasad was entirely at the mercy of his creditors. There was

pressing demand for him to borrow money to save the joint family property from auction sale. The lender was in a position to dictate terms to him which led to this hard and unconscionable bargain."

Upon this finding the Court below has held that the stipulation for interest was by way of penalty, and applying S. 74, Contract Act, has reduced the bond rate and allowed the plaintiff only simple interest at 12 per cent per annum as an adequate and reasonable compensation. The aforesaid finding of the Court below is to my mind, vague and insufficient for applying S. 16 or S. 74, Contract Act. The Court below has assumed, without giving any reason, that the terms in the bond relating to interest were hard or unconscionable. There is nothing on the record to show that the rate of interest and compound interest was unusual or was in any way exorbitant. The defendants have adduced no evidence on the point. On the other hand it would appear from the previous dealings between the parties as proved by Exs. 2, 2-A, 3 to 3-C, 4 to 4 Q, that the rate of interest of 2 per cent. per mensem was the usual rate paid by the mortgagor Sarju Prasad to the plaintiff's father Pokhar Mal. In the bond, Ex. A, dated 26th June 1917, executed by defendant 2 in favour of Gouri Dutt, defendant 18, the stipulation as to the interest is exactly in terms similar to those in the bond in suit, namely interest at 24 per cent. per annum and compound interest with yearly rests. Gouri Dutt in his evidence says that he has taken another bond also from Sarju Prasad. The rate of interest in the bond, far from being improvident, hard or unconscionable appears to be the usual market rate.

Again there is a vague suggestion, though there is no definite finding, that the lender took unfair advantage of the pressing need of the debtor and his own position as a lender in extorting from him the terms in the bond regarding interest. There is absolutely no room for such a suggestion upon the evidence on the record. It may be that there was pressing necessity for the debtor to incur the debt in question for which the mortgage bond was executed, or that the lender was in a position to dominate the will of the debtor, but there is nothing to show that he used that position to obtain an unfair advantage over the debtor. The question of undue influence was not seriously raised by any of the defendants except defen-

dant 23, who in his written statement, said that the plaintiff and his predecessor-in-interest used undue influence on the debtor and finding the debtor in a helpless and needy condition insisted on the hard and unconscionable interest and compound interest, and that the bargain struck by the plaintiff was hard, exorbitant and inequitable and as such not fit to be enforced in a Court of law or justice. This defendant, except filing the written statement, does not appear to have contested the suit in the Court below and, as a matter of fact, no issue in terms of the written statement was raised. This defendant has not entered appearance even in this Court, though impleaded as a respondent. The issue in this case as to the interest mentioned in the bond being excessive and by way of penalty was raised upon the written statement of the other defendants. No evidence was offered by the defendants as to the stipulation about interest having been inserted in the bond on account of any undue influence or coercion on the part of the lender. On the other hand the plaintiff has definitely proved that the stipulation regarding "interest and compound interest was not inserted in the bond under any undue influence" vide P. W. 1, a marginal witness to the bond: This evidence is not controverted and there is no reason why it should not be accepted. In fact the Court does not definitely find that the contract as to interest was brought about by undue influence or pressure, and even if it meant to do so, its finding would be without any evidence on the record. The result is that the finding of the Court below that the interest was hard and unconscionable or that the lender took advantage of his position and dictated terms to the borrower, must be set aside and with it the foundation upon which the learned Subordinate Judge has applied S. 74, Contract Act, for holding that the stipulation regarding interest was by way of penalty.

Now as to the terms of the bond. The stipulation in the bond itself does not in any way show that it was by way of penalty. The bond provides that interest and compound interest at 2 per cent. per mensem would be payable upon the principal sum of Rs. 4,000 from the date of the bond to the due date, 30th Baisakh 1311, and on default of the payment of the loan

on the due date the interest and compound interest at the aforesaid rate would continue to be payable up to the date of realization, and that on 24th Assin 1311, each year interest and compound interest then accruing would be added to the principal and will carry interest and compound interest. In other words, the bond provides for payment of interest and compound interest at the rate of 24 per cent. per annum with yearly rests. The bond does not stipulate for the payment of increased rate from the date of default in payment, nor does it in any way vary the rate of interest on account of such default. S. 74 has therefore no application to the aforesaid stipulation for interest in the present case. The Court below as well as the learned vakil on behalf of the respondents has relied on certain judgments of the Calcutta High Court in the cases of *Khagaram Das v. Ram Sankar* (1) and *Sanat Kumar Das v. Indra Nath Barman* (2). In the former case S. 74 was applied where the entire sum payable in 10 instalments without interest was in default of payment of one or two instalments not only made repayable in one lump sum but was also made to carry interest at an unusual rate. This does not apply to the present case. Similarly, in the latter case S. 74 applied to the facts and circumstances of that case as is obvious from the following observation made by the learned Chief Justice

"But I wish to make it quite clear that this agreement is a stipulation by way of penalty, having regard to the circumstances of this case only because it may well be that in other cases 75 per cent is a perfectly proper rate. At any rate it may not be a stipulation by way of penalty."

The principle enunciated in *Satish Chunder Giri v. Hem Chunder Mookhopadhyaya* (3) seems to apply to the present case. This Court in several cases has held that it is not competent to rip up a contract merely because it considers the rate of interest hard and unconscionable and that a debtor cannot be relieved except by showing that he comes within the four corners of S. 16, Contract Act: *Nathuni Sahu v. Baijnath Prasad* (4) and *Lakhi Chand Sahu v. Pear Chand Sahu* (5). The Court below has declined to follow the authorities of

(1) [1915] 42 Cal. 652=27 I. C. 815.

(2) [1916] 44 Cal. 162=34 I. C. 609.

(3) [1902] 29 Cal. 823.

(4) [1917] 2 P. L. J. 212=39 I. C. 352.

(5) [1917] 2 P. L. J. 283=39 I. C. 106.

this Court, saying that they are in conflict with those of the Calcutta High Court. This appears to be unjustifiable on the part of the learned Subordinate Judge. He was bound to follow the decisions of this Court whether they were right or wrong or whether they were in conflict with the decisions of the other High Courts in India. On the other hand the aforesaid authorities of this Court are supported by the principle enunciated by their Lordships of the Judicial Committee in several cases, and notably in the two recent cases, *Aziz Khan v. Duni Chand* (6) and *Lala Balla Mal v. Ahad Shah* (7). In these cases the stipulations for interest and compound interest were similar to those in the present case and the principal sum had swollen up to considerable amounts. Their Lordships observed that the transaction was unduly improvident but, in the absence of any evidence to show that the money lender had undoubtedly taken advantage of his position it is difficult for a Court of justice to give relief on grounds of simple hardship. In the case of *Auseri Lal v. Raja Maneshar Bakhsh Singh* (8), relied on by the Court below their Lordships of the Judicial Committee lay down that under the amended S. 16, Contract Act, it has to be seen whether a person in a position to dominate the will of the debtor "used that position to obtain an unfair advantage over the debtor." Of course, in that case it was found as a fact that undue influence was used in bringing about the terms of the contract. It has already been shown that in the present case the interest in the bond was not at all hard or unconscionable but that it was the usual and market rate of interest and that the transaction was in the ordinary course of business and that the contract was not induced by undue influence. Even if the interest was unusual hard or unconscionable, upon the principle of the aforesaid cases the lower Court was not competent to disallow the contract rate.

Another reason given by the lower Court to reduce the interest is that the stipulated rate of interest if allowed,

will prove ruinous to the minor defendant 1. The view taken appears to be unsound. The ruling relied upon by the Court below, *Ganga Das Bhattar v. Jogendranath Mitra* (9), has obviously no application to the present case inasmuch as the ground stated in that case for reducing the interest namely, that there is nothing to show that there was any necessity to borrow money at the unusual rate of interest does not exist in the present case. The rate of interest in the present case is not unusual at all.

The debt was contracted by the karta of the family to save the family property advertised for sale in which the minor was interested at the usual rate of interest. There is no reason why defendant 1, who was then a minor, should not be bound by the agreement entered into by his father, the karta of the family. The plaintiff is therefore entitled to the interest and compound interest calculated according to the rate stipulated for in the bond, namely, 24 per cent. per annum, with compound interest and yearly rests. The lower Court has held that one Bhagwat Rai, who has purchased property No. 3 of Sch. 2, subsequent to the present mortgage, has not been made a party and that the value of that property, Rs. 96, should therefore be deducted from the principal sum. In this view the Court below appears to be right. The interest will therefore be calculated upon Rupees 3,904 as found by the Court below. The result is that the appeal is decreed with costs. A decree will be prepared by this Court for a sum of Rs. 3,904 as principal plus the amount of interest and compound interest, calculated at the rate of 24 per cent per annum from the date of the bond till six months from this date as the date fixed for the payment of the money. In the event of nonpayment of the decretal amount within six months from this date, the plaintiff will be entitled to sell the mortgaged properties mentioned in Sch. 1. The rate of interest from the date fixed for payment will be at 6 per cent. per annum. The order of the Court below regarding the order in which the mortgaged properties are to be sold will stand good.

Mullick, J.—I agree. In my opinion the case is concluded by the judgment of their Lordships of the Privy Council in *Lala Balla Mal v. Ahad Shah* (7). In (9) [1907] 5 C.L. J. 315.

(6) A. I. R. 1918 P. C. 48=101 P. R. 1918=48 I. C. 933 (P. C.).

(7) A. I. R. 1918 P. C. 249=124 P. R. 1918=48 I. C. 1 (P. C.).

(8) [1906] 28 All. 570=33 I. A. 118 (P. C.).

my opinion the creditor was not in a position to dominate the will of the debtor within the meaning of S. 16, Contract Act, as amended. Even if he was in a position to do so, by reason of the pecuniary distress of the debtor, it has not been shown that he used his position to obtain an unfair advantage over him. If the contract were hard and unconscionable, then, the onus under sub-Cl. (3), S. 16, would lie on the creditor to show that the contract was not induced by undue influence. But there is nothing in the circumstances of this case to justify such a view of the nature of the contract. And, apart from any question of onus, I think the evidence clearly shows that the creditor did not obtain any unfair advantage over the debtor. S. 16 therefore does not assist the debtor. As to S. 74 the debtor would be entitled to relief if he could show that the stipulation for compound interest in this case was in the nature of a penalty. Upon the authorities, it is quite clear that an exorbitant rate of interest is not in itself a penalty. Nor is the stipulation to pay compound interest from the date of default such a stipulation. The Court therefore had no power to give relief under S. 74 of the Act. In my opinion, the Courts in India are precluded from relieving the debtor with regard to interest unless the case comes within the purview of S. 16 or S. 74, Contract Act.

With regard to the minor I agree with the observations of my learned brother. The terms of the contract were such that the debt must be considered to have been contracted for legal necessity. With regard to the property purchased by Bhagwat Rai, I agree that his nonjoinder is not a sufficient ground for the dismissal of the suit. By his action the plaintiff must be held to have split up the mortgage and to have released the defendants from liability for that part of the debt, namely, Rs. 96, which represents the price of the property sold to Bhagwat. A decree therefore for the capital sum after deduction of this sum of Rs. 96 against the present defendants, is, in my opinion, correct.

V.S./R.K.

Appeal accepted.

**** A. I. R. 1919 Patna 297**

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Sridhar Sirdar and others—Defendants—Appellants.

v.

Jageshwar Singh Mahapatra and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 70 of 1918, Decided on 23rd July 1919, from decision of Ali Imam, J, D/- 25th July 1918.

**** Civil P. C. (1908), S. 47—S. 47 does not bar suit by decree-holder to recover possession based on title acquired by sale of property in execution of his decree—Such suit must be brought within period of limitation prescribed by Limitation Act (1908), Art. 138.**

Questions relating to the possession of property purchased by the decree-holder at a sale in execution of his decree are not questions relating to the execution, discharge and satisfaction of the decree within the meaning of S. 47, Civil P. C., and that section is no bar to a suit by such decree-holder to recover possession based upon the title acquired by the sale and on the ground that by the sale the right, title and interest of the judgment-debtors in the land was extinguished and they were mere trespassers. Such a suit must be brought within the period of limitation prescribed by Art. 138. [P 304 C 2]

Abani Bhusan Mukerji—for Appellants.

Atul Krishna Rai—for Respondents.

Dawson-Miller, C. J.—This is an appeal under Cl. 10, Letters Patent, by defendants 1 to 3, who are the principal defendants in the suit, from the decision of a single Judge of this Court, dated 25th July 1918, whereby he overruled the decision of the District Judge of Manbhum and restored that of the Munsif. The plaintiffs and the pro forma defendants were proprietors of mauza Delikhana. The principal defendants were tenants under them of a holding in the said mauza. The rent having fallen into arrears, the landlords brought a suit against the tenants and in July 1909 obtained a decree in that suit. The property was put up for sale in execution of the decree and it was purchased by the landlords themselves. On 6th May 1910 the sale was confirmed and in July of the following year the sale certificate was obtained. At that time a partition suit was pending between the plaintiffs and the pro forma defendants who were members of a joint family, and no application appears to have been made by them as auction-purchasers under O. 21, R. 95, Civil P. C., to be put in possession of the holding purchased by them within

three years of the confirmation of the sale. As a result of the partition suit, the mauza in question, including the right to possession of the defendants' holding, fell to the share of the plaintiffs who, on 5th May 1916, instituted the present suit claiming khas possession of the holding against the principal defendants who were still in possession.

Amongst other defences, the defendants contended that the suit was barred by S. 47, Civil P. C., the plaintiffs' remedy being to apply for delivery of possession in the Court executing the rent decree, and that a separate suit was not maintainable. The Munsif decided all issues in the plaintiffs' favour and granted the decree asked for. On appeal the District Judge considered that such a suit would be governed by the provisions of the Chota Nagpur Tenancy Act, 1908, and that by Ss. 139 and 231 of that Act it was cognizable by the Deputy Commissioner only and ought to have been brought within one year from the date when the cause of action accrued. He treated the case, however, as one in execution of a decree and held that it was barred by S. 47, Civil P. C., as well as by S. 92, Act 10 of 1859, which was in force when the rent suit was instituted, and that in either case the limitation period of three years had expired. The plaintiffs appealed to this Court, and the learned Judge who heard the appeal held that the suit could not be treated as an application in execution governed by Art. 180, Lim. Act, and that as it did not relate to the execution, discharge or satisfaction of a decree, it was not governed by S. 47, Civil P. C. He further held that the Chota Nagpur Tenancy Act had no application. In these circumstances, he held that the period of limitation was 12 years from the date when the sale became absolute, as prescribed by Art. 138, Lim. Act, and restored the decree of the trial Court setting aside that of the District Judge. It is from that decision that the present appeal is brought.

The first contention argued before us was that the suit fell within S. 139, Chota Nagpur Tenancy Act, and was cognizable only by the Deputy Commissioner, and that under S. 231 of the same Act the limitation period was one year from the date of the accruing of the cause of action. There are two answers

to this argument. First the Act was not applied to Munbhum within which district the property is situated until 22nd November 1909, which is after the rent-decree was obtained, and it is not shewn that the application of the Act to Munbhum had any retrospective operation. Secondly, it is quite clear that none of the cases mentioned in S. 139 which are triable by the Deputy Commissioner cover the present suit. The only case relied on is that mentioned in Cl. 4 of the section, viz.:

"All suits under this Act to eject any tenant of agricultural land or to cancel any lease of agricultural land."

This is not a suit to eject a tenant or to cancel a lease. The defendants ceased to be tenants at the time when their holding was sold and their rights in the holding passed to the purchaser. Since then their status is that of trespassers, not tenants. The suit in fact is not one under the Chota Nagpur Tenancy Act at all and Ss. 139 and 231 can have no application. The appellants' main contention however was that the case is covered by S. 47, Civil P. C., as it raises question between the parties to the suit in which the rent decree was passed relating to the execution, discharge or satisfaction of that decree. Although it is by no means clear that S. 47, Civil P. C., applies to a case where the sale took place under Act 10 of 1859 and where the sale certificate was granted under S. 11, Act 8 of 1865, I assume, for the purposes of this part of my judgment that the Civil Procedure Code applies. There can be no doubt that both the plaintiffs and defendants were parties or represent parties to that suit and the only question which arises is whether the questions for determination relate to the execution, discharge or satisfaction of the rent-decree. This is a matter about which there has been considerable controversy in the High Courts of Calcutta and Allahabad. The importance of the question for present purposes arises from the fact that if a separate suit is not barred by S. 47 then it was instituted within time, the period for bringing such a suit being that prescribed by Art. 138, Lim. Act, viz., 12 years from the date when the sale became absolute. If it is barred by S. 47, then the period in which the application in execution should have been made is

three years and as the suit was not instituted within that period, it cannot now be treated as an application in execution under S. 47.

The decisions of the Calcutta High Court are somewhat conflicting. One of the earliest decisions is that of *Kristo Gobind Kur v. Gunga Pershad Surma* (1) in the year 1876, which decided that the plaintiff, who was the auction-purchaser, should not be entitled to bring a fresh suit for possession as he might have enforced his rights under the decree in execution of which he purchased. The basis of the decision was that litigation might be endless if parties failed to exercise their rights under decrees and were afterwards allowed to bring fresh suits for the same relief. Whilst entirely agreeing with the general principle that litigation should not be endlessly protracted, the question we have to determine is whether in the particular instance the legislature has in fact barred the plaintiffs' right of suit in the case before us. The decision in *Kristo Gobind Kur's* case (1) was followed with some hesitation by Sir R. Garth, C. J., and Morris, J., in 1881 in *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (2). In *Krishna Lall Dutt v. Radha Krishna Surkhel* (3) decided in 1884, the Court held, where formal possession had been obtained from the Court by the auction-purchaser but had not been followed by any act of possession and so had become infructuous, that a separate suit was maintainable. In 1885 the same High Court decided in the case of *Iswar Pershad Gurgo v. Jai Narain Giri* (4) that the decision in *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (2) (*ubi sup.*) did not lay down that under no circumstances would a suit lie by the auction-purchaser who was also a decree-holder, but that so long as the remedy provided by S. 318, Civil P. C., (now O. 21, R. 95) was open to the purchaser, he was bound to have recourse to that section rather than to bring a fresh suit. In that case it appears that at the date when the suit was instituted more than 3 years had passed from the time when possession was confirmed, and hence the remedy provided by S. 318, Civil P. C.,

then in force was barred by limitation. Some attempt however had been made to obtain possession under that section which had proved infructuous. The Court decided that there was no reason in law why the suit should not be maintained and that the purchaser's title was not extinguished merely because the summary remedy provided by S. 318 was no longer available. On the other hand, in the case of *Madhusdan Das v. Gobinda Pria Chowdhurani* (5), decided in the year 1899, the Calcutta High Court held that proceedings for delivery of possession to the auction-purchaser after a sale in execution of a decree were proceedings in execution of the decree, and that when the application for possession is resisted by the legal representative of the judgment-debtor, the question so raised came within the purview of S. 244, Civil P. C., of 1882 and must be decided under that section and not by a separate suit.

Finally, in the case of *Sasibhusan Mookerjee v. Radhanath Bose* (6), which was decided in 1913, the Calcutta High Court, after reviewing the authorities at some length, decided that an order for delivery of possession to the execution-purchaser, who was himself the decree-holder, was not an order relating to the execution, discharge or satisfaction of the decree nor was it one arising between the parties to the suit or their representatives merely because the decree-holder happened to be the execution purchaser. For the latter proposition reliance was placed upon the earlier case of *Nana Kumar Roy v. Golam Chunder Dey* (7), where it was held that an order under S. 312 of the Code of 1882 setting aside an execution sale cannot be treated as an order under S. 244 of the same Code because the decree-holder happens to be the auction-purchaser. The Court, after reviewing the conflicting decisions of the Calcutta High Court, followed the decision of a Full Bench of the Allahabad High Court in *Bhagwati v. Banwari Lal* (8), which affirmed the principle that a decree-holder, whether holding a decree for sale under a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment-debtor,

(1) [1876] 25 W. R. 372.

(2) [1882] 10 C. L. R. 258.

(3) [1884] 10 Cal. 402.

(4) [1886] 12 Cal. 169.

(5) [1900] 27 Cal. 34.

(6) A. I. R. 1915 Cal. 137=25 I. C. 267.

(7) [1891] 18 Cal. 422 (F. B.).

(8) [1903] 31 All. 82=1 I. C. 416 (F. B.).

is in the same position as would be any other purchaser at an auction sale held in execution of such a decree. It seems clear therefore that the weight of authority in the decisions of the Calcutta High Court appears to be in favour of the view that questions concerning delivery of possession to an auction purchaser at a sale in execution of a decree, whether he be a decree-holder or a stranger to the suit, are not questions relating to the execution of the decree.

The Allahabad High Court by the Full Bench decision just cited have clearly settled this question against the contention of the present appellants. The Bombay High Court however has taken a different view. In the case of *Sadashiv Mahadu v. Narayan Vithal* (9) a Full Bench of that High Court decided that a mortgagee decree-holder, who purchased the property ordered to be sold in execution of his decree, was not entitled to bring a separate suit for possession against the mortgagors, but was limited by S. 47, Civil P. C., to his remedy under O. 21 of the Code.

In this conflicting state of the authorities it would have been necessary for us to exercise an independent judgment, but for the fact that, so far as this Court is concerned, the point appears to have been substantially decided by a Full Bench ruling in the case of *Haji Abdul Gani v. Raja Ram* (10). The immediate question for determination in that case was, whether an appeal lies from an order passed under R. 95, O. 21, Civil P. C. An appeal would lie only if the decision appealed from came within the provisions of S. 47, and it was necessary for the Court to decide this question in order to determine whether an appeal would lie. In that case the respondents had obtained a money decree against the appellant and purchased certain property of the appellant which had been ordered to be sold in execution of the decree. Possession was obstructed by the appellant, and the respondents applied under O. 21, R. 95, to be placed in possession of the disputed property. The respondents obtained an order from which the appellant sought to appeal. The Court, after reviewing the authorities above mentioned and many others, unanimously decided that

questions relating to the possession of property purchased by the decree-holder under the circumstances stated were not questions relating to the execution, discharge or satisfaction of the decree within the meaning of S. 244 of the Code of 1882 or S. 47 of the present Code. The principle upon which that decision was based appears to me to govern the present suit and I think that this appeal must be dismissed with costs. I only wish to add that I have had an opportunity of reading the judgment about to be delivered by my learned brother and I concur with him in the reasoning by which he arrives at an independent conclusion that the questions raised in this suit are not questions relating to the execution, discharge or satisfaction of the decree.

Jwala Prasad, J.—This is a Letters Patent appeal from the decision of a single Judge of this Court, dated 25th July 1918, reversing the decision of District Judge of Purulia (Manbhum), dated 22nd June 1917 and restoring that of the Munsif, dated 6th March 1917. Defendants 1 to 3 are the appellants before us. They had held in village Delikhana, Pergana Manbhum, the lands in suit as their jote kamai holding. The plaintiffs and the pro forma defendants as landlords of the 16 annas of the said mauza obtained a decree, Exhibit 4, for rent against the principal defendants 1 to 3 for Rs. 64-15-10 on 21st July 1909, and in execution of the said decree they purchased the holding of the appellants on 4th April 1910. The sale was confirmed on 6th May 1910 and the sale certificate, Ex. 3, was obtained on 11th July 1911, but on account of there being a partition suit, No. 223 of 1911, pending between the plaintiffs and the pro forma defendants, the head member of the family neglected to take out delivery of possession through the executing Court. By the aforesaid partition suit the entire mauza with the said lands of the principal defendants in suit was allotted to the plaintiffs. The plaintiffs therefore brought the present suit against the appellants for recovery of possession on 5th May 1916, in the Court of the Munsif of Purulia, within 12 years of the confirmation of the auction sale.

The appellants, principal defendants, resisted the claim of the plaintiffs on all possible grounds. They stated that the

(9) [1911] 35 Bom. 452=11 I. C. 987.

(10) [1916] 1 P. L. J. 232=35 I. C. 468 (F.B.).

plaintiffs received rents from them in 1318 and 1319 and recognized them as their tenants, and hence the relationship of landlord and tenant continued and existed between the plaintiffs and the appellants even after the confirmation of the sale, and that the latter were not trespassers and hence the suit for ejectment could not lie. They also pleaded that the rent decree and the sale were collusive and not bona fide and as such were not binding upon them. These questions of fact have been set at rest by the findings of the trial Court as confirmed by the first Court of appeal and are no longer before us for consideration. The appellants however disputed the right of the plaintiffs to institute the present suit and contended that the suit was barred by limitation. The Munsif overruled the contentions of the appellants and decreed the suit of the plaintiffs. On appeal the learned District Judge held that under Ss. 139 and 231, Act 6 of 1908, the plaintiffs' suit was cognizable only by the Deputy Commissioner and must have been brought within one year. He further held that the plaintiffs' remedy was to make an application for delivery of possession of the property purchased at the auction sale and that the present suit was barred by S. 47, Civil P. C. Treating the suit as an application in execution the Court held that the right to recover possession was barred by S. 92, which prescribes three years as the period of limitation within which a process of execution can be issued. Upon the aforesaid findings the learned District Judge held that the suit was "barred by limitation besides being not maintainable in the present Court." Accordingly he dismissed the plaintiff's suit.

On appeal by the plaintiffs to this Court, the decision of the District Judge has been upset and the suit for possession of the plaintiffs has been decreed. Against the decision of this Court, defendants 1 to 3 have appealed to us under S. 10, Letters Patent and contend that the decree of this Court must be set aside upon the grounds that were raised by them and accepted by the District Judge. The first contention raised is that the suit of the plaintiffs was cognizable only by the Deputy Commissioner of Palamau and that the suit should have been brought within one year from the

confirmation of the same. Reliance has been placed upon Ss. 139 and 231, Chota Nagpur Tenancy Act (6 of 1908). The latter section provides that:

"All suits and applications instituted or made under this Act (Chota Nagpur Tenancy Act), for which no period of limitation is provided elsewhere in this Act, shall be commenced and made respectively within one year from the date of the accruing of the cause of action."

Section 139 enacts that the suits and applications specified therein

"shall be cognizable by the Deputy Commissioner, and shall be instituted and tried and heard under the provisions of this Act, and shall not be cognizable in any other Court, except as provided under this Act."

The suits and applications referred to in S. 139 have been enumerated in Cls. 1 to 8 of the section. All these clauses relate to suits between the landlords and tenants except suits by or against the headmen of villages or groups of villages for declaration of title in or of possession of their office or agricultural land (Cl. 6) and suits by landlords and others in respect of the rent of land against any agents employed by them in the management of the land or the collection of rents, etc. (Cl. 7). The present suit for ejectment of the defendants and recovery of possession, based upon title acquired by an auction sale and on the ground that by the sale the right, title and interest of the defendants in the land was extinguished, and that they are mere trespassers, does not come under any of the aforesaid clauses of S. 139. According to the decision of a Division Bench of this Court in the case of the *Tata Iron and Steel Company Ltd. v. Raghunath Mahto* (11) it was pointed out that the Deputy Collector acquires special jurisdiction only in suits specified in S. 139, Chota Nagpur Tenancy Act, and that he has no jurisdiction to try a suit not coming under any of the clauses of the said section. The learned vakil on behalf of the appellants has failed to show that the present suit comes under any of the provisions in the Chota Nagpur Tenancy Act. Ss. 139 and 231 have no application to the present suit. The suit was therefore cognizable by the Munsif and was rightly instituted in his Court; and was not barred by one year's limitation.

On the other hand, the Chota Nagpur Tenancy Act does not seem to apply to the present case. The Act came into operation on 11th November 1908 and

was extended to Manbhum by notification dated 22nd November 1909, under S. 1, Cl. (3), and does not apply to the decree Ex. 4, which was obtained under the Rent Act (10 of 1859) on 21st July 1909. This is clear from the decree itself, which states that it was passed under Act 10 of 1859 and the sale certificate Ex. 3, which states that the sale took place under the provisions of Act 8 of 1865 and that the certificate was granted under the latter Act. The learned vakil on behalf of the appellants saw the difficulty of applying the Chota Nagpur Tenancy Act to the present case and contended that the suit is barred by the Rent Act (10 of 1859). Ss. 23 and 92, Rent Act, exactly correspond to Ss. 139 and 231, Chota Nagpur Tenancy Act, and do not bar the present suit for the reasons already stated with regard to the inapplicability of Ss. 139 and 231 of the latter Act to the present case. It is then contended that S. 92, Act 10 of 1859, which provides that:

"No process of execution of any description shall be issued on a judgment under this Act after the lapse of three years from the date of judgment"

bars the present suit. This contention also appears to be unsound, inasmuch as the said section only affects the process of execution, but the present suit of the plaintiffs is not a process of execution of any judgment or decree. The plaintiffs had therefore two remedies to obtain possession: one by an application to the executing Court under S. 11, Act 8 of 1865, and another by a suit; and they can at their option choose the one or the other. It is next contended that the proper course for the plaintiffs was to execute the sale certificate and to obtain possession through the executing Court, and that unless that remedy was exhausted the plaintiffs have no right to institute the suit to obtain possession based upon the auction sale. The sale took place under S. 7, Act 8 of 1865 read with the Rent Act 10 of 1859 and the certificate was obtained under S. 11, Act 8 of 1865. This section is similar to O. 21, R. 95, of the Code of Civil Procedure, and provides that:

"when the purchase money shall have been paid in full, the officer conducting the sale shall give the purchaser a certificate in the form prescribed in the schedule annexed to the Act; and shall further, on the purchaser making an application and depositing the requisite costs, depute an officer or Amin to put him in possession

of the under-tenure in the customary manner and to publish the fact of the purchase to the cultivators of the land comprised therein."

The remedy given by S. 11 is not exhaustive and does not necessarily exclude the right, under the general law, of the plaintiff to recover possession of the property purchased by him at the auction sale on failure to obtain possession under S. 11. There is no provision in Act 10 of 1859 or in Act 8 of 1865 restricting the right of the plaintiff to institute his suit for recovery of possession, which right he undoubtedly has under S. 9, Civil P. C. Unless the right under the latter section was clearly barred by any enactment, the plaintiffs' suit is not barred at all.

Lastly, it is contended that the plaintiffs' suit is barred by S. 47, Civil P. C. In the first place S. 47 does not appear to apply to the rent suit in which the plaintiffs and their cosharers obtained the rent decree in execution of which the property was purchased by them. Neither Act 10 of 1859, nor Act 8 of 1865, nor the Chota Nagpur Tenancy Act, has enacted that the provisions of the Code of Civil Procedure should apply to the suits or the decrees obtained under those Acts. S. 265 clearly says that the Local Government may make rules directing that any provision of the Code of Civil Procedure shall apply to all or any classes of cases before the Deputy Commissioner. No such rule has been shown to us by virtue of which S. 47, Civil P. C., would apply to the present case. Rent Act 10 of 1859 is complete in itself and provides complete machinery and rules of procedure for the suits instituted under those Acts and for the execution of decrees obtained thereunder.

The lower appellate Court has, upon the authority of the case of *Chaitan Patjosi v. Kunja Behari* (12), held that except upon points expressly provided for by Act 10 of 1859 the procedure of the Revenue Court would be governed by the Code of Civil Procedure. That was a case in which the question whether a judgment-debtor was entitled to have the sale set aside on a deposit under S. 310-A, Civil P. C. The sale of the land in that case was not for arrears of rent due in respect of the land, and under Ss. 109 and 110 of the Rent Act the sale of under-tenures "for demands other than

those of arrears of rent" is held under the law applicable to such sale, i. e., under the Civil Procedure Code, and hence S. 310-A of the Code applied to such a sale. That ruling has no application to the present case which would rather seem to be governed by the earlier authorities of the said Court in the case of *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (13) and the Full Bench decision in *Nagendra Nath Mullick v. Mathura Mahun Parhi* (14). On the principle upon which S. 373, Civil P. C., in the former case was not applied to bar the second suit, S. 47, Civil P. C., would not apply to decrees passed and executed and a sale held under the Rent Act (10 of 1859). More so, when S. 47 takes away the general right of instituting a suit. Hence O. 21, R. 95, and S. 47, Civil P. C., are inapplicable to the case of the plaintiffs and do not at all bar the suit. Even if S. 47 did apply, the question is whether the proceedings to obtain possession after an auction sale at which the decree-holder himself purchased the property, relate to "the execution, discharge or satisfaction of the decree."

It is clear that the section has no application to a purchaser who is not a decree-holder and that his failure to obtain possession or to make an application for delivery of possession under O. 21, R. 95, will not bar a suit for recovery of the property. Such a suit will be governed by Art. 138, Lim. Act, the period of limitation for which is 12 years. No doubt a decree-holder purchasing the property in execution of the decree is a party to the suit and as such all questions relating to the execution, discharge or satisfaction of the decree would come under S. 47 and will be determined under that section and not by a separate suit. But the question is whether the question relating to the delivery of possession after the sale is one that relates to the execution, discharge or satisfaction of the decree. If it does relate to the execution, discharge or satisfaction of the decree, then a separate suit would be barred and an application should therefore be made under O. 21, R. 95, the period for which is three years within which the application should be made. Whereas, if it does not come under S. 47, then a separate

suit for recovery of possession will not be barred and Art. 138, Lim. Act, will govern the suit. There has been a great conflict of decisions upon the point. The earlier decisions in Calcutta seem to favour the view that a separate suit will not lie: vide *Kristo Govind Kur v. Gunga Pershad Surma* (1). The view expressed there was however doubted by Garth C. J., in the case of *Lalit Coomar Bose v. Ishan Chunder Chuckerbutty* (2) and was distinguished in *Seru Mohan Bania v. Bhagoban Din Pandey* (15) and *Krishna Lall Dutt v. Radha Krishna Surkhel* (3), and latterly in *Iswar Pershad Gurgo v. Jai Narain Giri* (4). It was again acted upon in a later decision of the Court in *Madhusudan Das v. Govinda Pria Chowdhurani* (5). The ruling in *Sasilhusan Mookerjee v. Radhanath Bose* (6) seems to settle the point so far as the Calcutta High Court is concerned. The long course of decisions in the Calcutta High Court indicates that the balance of opinion in that Court has been strongly in favour of the view that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under S. 47 of the present Code or S. 318 of the old Code.

So far as the Allahabad High Court is concerned, the view appears to have been settled by a Full Bench in the case of *Bhagwati v. Banwari Lal* (8). The Bombay High Court in the case of *Sadashiv Mahadu v. Narayan Vithal* (9) has taken a different view and entirely supports the contention of the appellants.

The matter appears to have been settled so far as this Court is concerned by a Full Bench decision in the case of *Haji Abdul Gani v. Raja Ram* (10). In that case it was decided that no appeal lies from an order under R. 95, O. 21, Civil P. C. The basis of the decision is that such an order does not dispose of a question relating to the execution, discharge or satisfaction of the decree, even when the question is between the judgment-debtor and an auction purchaser who originally was the plaintiff in the suit and hence the order is not a decree within the meaning of S. 2, Civil P. C. Upon the principle deduced from that ruling, S. 47 will not bar a separate suit by a decree-holder purchaser in order to

(15) [1883] 9 Cal. 602.

(13) [1894] 21 Cal. 428.

(14) [1891] 18 Cal. 368 (F. B.).

obtain recovery of possession of the property purchased at the auction sale. This decision seems to settle the question so far as this Court is concerned and has lately been followed in the case of *Dhaninder Das v. Bakhshi Harihar Prasad Singh* (16), where it was directly held that the proceedings adopted to obtain delivery of possession of the property purchased in execution of a decree do not relate to the execution, discharge or satisfaction of that decree and S. 47, Civil P. C., has no application to such proceedings. In that case the decree-holder himself was a purchaser. We are thus relieved from the necessity of reviewing the authorities on the subject and coming to a definite conclusion as to which of the conflicting views is in agreement with the provisions of the Code of Civil Procedure. However it may be mentioned that the execution of the decree terminates by the satisfaction of the decree, by payment thereof or the sale of the property in execution of the decree. O. 21 no doubt relates to and is headed by "execution of decrees and orders," and R. 95 relating to the delivery of possession by the executing Court to the purchaser at the auction sale is placed in that chapter. It is therefore contended that the question relating to the delivery of possession also relates to the execution of the decree. R. 64 of the said order provides that the Court executing the decree may direct that a certain property "shall be sold to satisfy the decree and that the proceeds of such sale or portion thereof shall be paid to the party entitled under the decree to receive the same."

A decree-holder can only purchase on express permission of the Court obtained under R. 72 which provides that when the decree-holder purchases the property "the purchase-money and the amount due under the decree is to be set off one against the other and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

It is thus clear that when a decree-holder purchases a property the decree is satisfied by the very fact of his purchase to the extent of the amount at which the property is knocked down. If the sale is good, then the execution is finished and the decree satisfied. The question regarding the possession of the property is a question therefore between the Court and the purchaser, whether he be a de-

cree-holder or a stranger. When the executing Court having seized the property sells it, it is bound to give possession of the property to the auction purchaser. This will be under the general law under which a vendor is bound to give possession to the vendee. R. 95 is simply a recognition of this principle and provides an easy and prompt method of obtaining possession from the Court that sells the property. The rule therefore has been placed in the chapter relating to the execution of decrees for the sake of convenience and in order to enable the executing Court to give effect to the auction sale. The placing of the section by no means shows that the proceeding relating to the delivery of possession should be regarded as relating to the execution of the decree. This contention therefore of the appellants fails.

The suit is not therefore barred by S. 47, Civil P. C., and the limitation prescribed by Art. 180, Lim. Act. which relates to applications made under the Code of Civil Procedure has no application to the suit. The suit will therefore be governed by Art. 138, Lim. Act, and having been brought within 12 years of the auction sale is not at all barred.

Different considerations arise where a decree directs delivery of possession. In such a case title to the property and the right to recover possession is declared by the decree itself and the remedy to obtain possession of the property is by executing the decree, but where, as in the present case, the decree is only for rent or for money and no title to any property is created by the decree, the right of the decree-holder to recover possession arises from the sale of the property and not under the decree. His right to possession therefore may be enforced either by a suit or by any summary procedure that the law may have provided. The remedies of such a purchaser are therefore two fold: one by an application under O. 21, R. 95, and another by a regular suit. The result is that all the contentions of the appellants fail and this appeal must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 305 (1)

COUTTS, J.

Mahabir Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 436 of 1918, Decided on 9th January 1919, against order of Sess. Judge, Saran, D/- 9th November 1918.

(a) Bihar and Orissa Excise Act (2 of 1915), Ss. 47 and 55—Prosecution only under S. 47—Accused convicted in addition under S. 55—Conviction held legal.

In the report of an Excise Sub-Inspector prosecution was asked for only under S. 47 (h), Bihar and Orissa Excise Act, but the accused was in addition tried for and convicted of offences under Ss. 47 (a) and 55 of the Act.

Held: that such a proceeding was not illegal, especially as the report disclosed facts constituting offences under the other sections. [P 305 C 1]

(b) Bihar and Orissa Excise Act (2 of 1915), Ss. 47 and 48—Removal of liquor—Presumption under S. 48 is not permissible in trial under S. 47 (h).

Section 48, Bihar and Orissa Excise Act, does not apply to a case of removal of liquor, and it is therefore illegal to make use of the presumption created by that section in the trial of an offence under S. 47 (h) of the Act. [P 305 C 2]

Rajendra Prasad—for Petitioner.*Manohar Lal*—for the Crown.

Judgment—The petitioner in this case is one Mahabir Singh, who was a clerk of the liquor warehouse or depot at Gopalgunj. He has been convicted under Ss. 47 (a), 47 (h) and 55, Excise Act and has been sentenced to a fine of Rs. 200 or in default to undergo rigorous imprisonment for one month.

It appears that on the evening of 13th July 1918 the petitioner was seen coming out of the warehouse office with something wrapped up in cloth under his arm. He went to the water-tank which adjoins the warehouse and left this bundle there. Shortly afterwards the petitioner handed over the bundle to one Sukat Kumari who was a coolie working at the depot and asked him to take it to the petitioner's house. Sukat started for the house of the accused, but was arrested by the Excise Sub-Inspector. The bundle was opened and was found to contain a bottle of liquor 64.6 overproof. On the statement of Sukat the accused was sent for but declined to say anything. The investigation was then taken up by the Excise Sub-Inspector, who submitted a report asking for the prosecution of the petitioner and Sukat under S. 47 (h), Excise Act. On this report a prosecution was started by the Subdivi-

sional Magistrate under Ss. 47 (a), 47 (h) and 55, with the result that the petitioner has been convicted and sentenced as already stated.

The first point taken in this revision is, that in the report of the Sub-Inspector prosecution was asked for only under S. 47 (h) and that the report did not disclose any offence under S. 47 (a) or S. 55. This contention is not sustainable. It is true that in Col. 6 of the Sub-Inspector's report he asked only for prosecution under S. 47 (h) for the illegal removal of the bottle of country spirit from the warehouse; but from Col. 8 it is clear that offences under Ss. 47 (a) and 55 were also disclosed, because in this column it is stated that the liquor was made over by the petitioner to Sukat and further that it was made over at the depot well.

The next point urged is that the conviction under S. 47 (h) is bad, inasmuch as the learned Subdivisional Magistrate has made use of the presumption created by S. 48 of the Act. It is conceded, and it is obviously so, that S. 48 does not apply in a case of removal of liquor. But it is clear from the evidence recorded by the Subdivisional Magistrate, that the accused removed the liquor from the depot office. The depot office is apparently the same place as the warehouse office and appears to be a part of the warehouse. The removal therefore was from the warehouse.

I therefore see no reason to interfere with the order of the Subdivisional Magistrate. The question of sentence has been referred to, but it does not appear to be unduly severe.

v.S./R.K.

*Sentence confirmed.**** A. I. R. 1919 Patna 305 (2)**

DAWSON-MILLER, C. J. AND COUTTS, J.

Bhaunath Gir—Defendant—Appellant.

v.

Bihari Lal and *another*—Plaintiffs—Respondents.

Privy Council Appeal No. 12 of 1919, Decided on 21st May 1919, from decision of Patna High Court.

* Civil P.C. (5 of 1908), S. 110—Property in dispute worth more than ten thousand but one party only appealing—His share not worth that amount—Appeal is not permissible.

In order to determine the value for the purposes of an appeal to His Majesty in Council in a case where there is a dispute as to property

valued at more than Rs. 10,000, and only one of the parties affected by the decision desires to appeal, what must be looked at the detriment to that party, and if, in fact, the total amount of the subject-matter of the suit so far as his interest is concerned is under Rs. 10,000, it does not come within the terms of S. 110 and therefore an appeal is not permissible. [P. 307 C 1, 2]

Bulwant Sahai and Rai Gurusaran Parsad—for Appellant.

Abani Bhusan Mukerji—for Respondents.

Dawson-Miller, C. J.—In this case defendant 2 in a mortgage suit instituted before the Subordinate Judge of Gaya seeks leave to appeal to His Majesty in Council from a decision of this Court, dated 9th August 1918, affirming a decision of the Subordinate Judge in execution proceedings arising out of the decree obtained by the plaintiffs in the mortgage suit. In order to understand how the question now under discussion arises, it is necessary to state the facts because the petitioner contends that notwithstanding that the judgment of this Court was a judgment of affirmance, there is a material question of law to be determined by their Lordships of the Privy Council. But before it becomes necessary to consider that question, the petitioner must make out that the subject matter of the suit in the Court of first instance and the subject matter of the dispute on appeal to His Majesty in Council is of the sum of Rs. 10,000 or upwards.

The plaintiffs were mortgagees of a 16-annas share in Mauza Panania Azimgarh and also of a 16-annas share in Mauza Panania Mani Chak. They brought a suit against the mortgagors on the basis of their mortgage. They added the present petitioner as a defendant, he being interested in a 4-annas share of Panania Azimgarh as subsequent mortgagee. When the decree was made, it was directed that there should be a sale first of all of at 12-annas share of Mauza Panania Azimgarh and a 16 annas share of Mauza Panania Mani Chak leaving the 4-annas share of the first mentioned property in which defendant 2, the present petitioner, was interested for subsequent sale, if the sale of the remainder of the property did not satisfy the plaintiffs' decree. When execution proceedings were taken out, the appellant objected to the valuation given in the sale proclamation by the plaintiffs, who had assessed the value at Rs. 4,000 for one of the properties and

Rs. 500 for the other. The present petitioner put the values at Rs. 16,000 and Rs. 4,000 respectively and these values were accepted by the Subordinate Judge. Subsequently that execution case was struck off for default of the decree-holders. A second execution case was then instituted and again the decree-holders put the value of these properties at Rs. 4,000 and Rs. 500 as previously. Again there was an objection by the petitioner and the objection was allowed. That execution case also was dismissed for default. A third attempt at execution was made, the values being stated as before, and this also failed. Eventually a fourth application was made in January 1917, when the decree-holders put the value of Mauza Panania Mani Chak at Rs. 500, the value of 12-annas of Panania Azimgarh at Rs. 4,000 and the value of the 4-annas share of the same property at Rs. 1,300. On this occasion they were successful and the sale took place in April 1917, the property being purchased by the decree-holders for the sum of Rs. 4,600 for the 12-annas share of Panania Azimgarh, Rs. 1,400 for the 4-annas share of the same property and Rs. 650 for the Panania Mani Chak property. The petitioner then applied in September 1917 to have the sale set aside, urging the same grounds as he had previously taken. That application was dismissed by the Subordinate Judge and on appeal to this Court, this Court affirmed the decision of the Subordinate Judge and dismissed the appeal. It is from that decision that it is now sought to appeal to His Majesty in Council.

It will be observed from what I have already said that the only interest which the petitioner has in the subject matter of this suit is an interest which he himself places at a valuation of Rs. 4,000. Therefore prima facie, it would appear that he was not entitled to appeal in a matter concerned with a claim to property of that amount. But his contention is that what he is asking the Court to do and what he is entitled to obtain is an order setting aside the sale of property valued according to him at a sum of well over Rs. 10,000, that is to say, setting aside not only the sale of the property in which he is interested as mortgagee but also setting aside the sale of the other property which had been ordered to be sold first before that in which he

was interested should be sold. It is quite true that he has an interest in seeing that the property is sold for an adequate sum and that the sale proclamation contains proper valuation, but the decree, in so far as it affects his interests, deals only with property on his own showing which is valued at Rs. 4,000 and in my opinion in order to determine the value of the subject matter in dispute it is necessary to look at it as it affects the interest of the party prejudiced by the order or decree objected to. Whatever may be the value of the property in which the petitioner is interested, his interest in that property cannot, it seems to me, from any point of view be regarded as more than Rs. 4,000.

In the case of *De Silva v. De Silva* (1) it was laid down by Sir Lawrence Jenkins, C. J., that in order to determine the value prescribed by S. 596, Civil P. C., then in force, which is similar in its terms for present purposes to the present Code, the decree has to be looked at as it affects the interests of the parties prejudiced by it and where the detriment to the party seeking relief is estimated at less than Rs. 10,000, then the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of the Code. In that case the plaintiff sued for a declaration that he was entitled to one-third share in certain property which had belonged to his mother and for an order that the property should be partitioned and his share given to him with mesne profits. He established his claim in the Appeal Court and obtained a decree. The defendants then applied to obtain leave to appeal to the Privy Council against that decree, and the argument on their behalf was that the decree directed a partition of the whole property which was valued at over Rs. 12,000 and, therefore the subject-matter in dispute exceeded the prescribed value although the plaintiff's share in that was less than Rs. 10,000. In dealing with this argument the learned Chief Justice laid down the proposition which I have just referred to. He said:

"The argument has been that inasmuch as the whole property is valued at Rs. 12,000,

there is a compliance with the terms of the section though the loss to the defendant by reason of the decree is limited to one-third of that property and profits. If we were to give effect to the contentions urged before us, it would follow that if the sole subject matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards, then a right to appeal to His Majesty in Council under the Civil Procedure Code would exist. It appears to me that this would be giving to the words of the section an operation that could not have been intended and the answer to the argument, in my opinion, is that while the detriment to the applicant under the decree must be estimated at less than Rs. 10,000, it has not been suggested that there is any other property outside the subject matter in dispute which can be affected by our decision, so that the decree does not involve any claim or question to or respecting property of the required amount."

It seems to me, agreeing as I do with that decision, that the principle there referred to applies with equal force to the present case. It is true that there is a dispute here as to property valued at more than Rs. 10,000 but what one really has to look to in all these cases, in my opinion, is what is the detriment to the person seeking to appeal to the Privy Council and whatever may be the value of the property in respect to which the claim is brought, if in fact the total amount of the subject-matter of the suit so far as the appellant's interest is concerned is under Rs. 10,000, then it seems to me that it does not come within the terms of the section. In the present case I think that the appellant has failed to show that the subject-matter of the suit or of the dispute in appeal is of the value of Rs. 10,000 or upwards and this application must be dismissed with costs. Hearing fee five gold mohurs.

Coutts, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 307

DAS, J.

Lal Mohamad Khan and others—Appellants.

v.

Mt. Krishna Dayal Gir—Respondent.

Appeals Nos. 1341 to 1352 of 1917, Decided on 16th May 1919, from appellate decrees of Dist. Judge, Shahubal.

(a) Bengal Tenancy Act (7 of 1885), S. 50—Rate of rent unchanged from time of permanent settlement—Tenant is fixed rate tenant.

In order to enable a Court to come to the conclusion that a tenant is a fixed-rate tenant it must be established that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. [P 303 C 2]

(1) [1904] 6 Bom. L. R. 403.

(b) Bengal Tenancy Act (7 of 1885), S. 50—Sub-S. 1 is rule of law while Sub-S. 2 is rule of evidence.

The rule laid down in sub-S. (1), S. 50 is a rule of law, whereas the rule laid down in sub-S. (2) of the section is a rule of evidence which merely raises a presumption that the conditions laid down in sub-S. (1) have been satisfied. [P 308 C 2]

(c) Bengal Tenancy Act (7 of 1885), S. 50—Portion of holding conceded not fixed rate holding—Presumption under S. 50 (2) does not arise.

In a case where the evidence, if accepted, gives rise to a presumption under S. 50, (2) that the entire area is a fixed rate holding, but it is conceded that a portion of the holding is not held at a fixed rate, the presumption arising under S. 50 (2) is affected and the holding cannot be held to be a fixed rate holding. [P 308 C 2]

A. Majid Mahmud and Md. Hasan Jan—for Appellants.

Manuk, S. N. Palit and Profulla Ch. Bose—for Respondent.

Judgment.—These appeals are on behalf of tenants and arise out of proceedings under S. 106, Ben. Ten. Act. It appears that at the attestation the tenants claimed Sharah Moaiyan status with reference to every portion of the holdings held by them, but that their claim was rejected on the ground that portions of the land consisted of bhowli converted since the permanent settlement. They raised the question again under S. 103 (a), Tenancy Act. Their claim was again disallowed as the documents on which they relied were not accepted, and as they could not identify the lands as to which they claimed Sharah Moaiyan status. They then commenced this action under S. 106, Ben. Ten. Act. In their plaint they enumerated the Khasra plots as to which they claimed the Sharah Moaiyan status and they asked the Court to declare that the entry in the Record of Rights recording them as kaemi tenants is erroneous and that they should have been recorded as fixed rate tenants with reference to these plots of land and they asked for further consequential reliefs. The lower appellate Court has come to these conclusions, first, that the tenants have established the fact that they have paid one rental for one area or where the area has varied then one rate for the cash rent holding for 20 years and so raised in their favour presumption under S. 50, sub-S. 2, Ben. Ten. Act; secondly, that admittedly a portion of the holding is bhowli land converted into a cash paying rent some time previous to these twenty years; and thirdly, the tenants have not

been able by their evidence to identify the Khasra plots as to which they claimed Sharah Moaiyan status. These findings are binding on me in second appeal, but in the very able arguments which have been advanced before me learned counsel appearing on behalf of the appellants has insisted that, upon the finding that the tenants have succeeded in establishing the fact that they have held at a fixed rent for 20 years, it was for the landlord to show that the holdings claimed by the tenants as fixed rate holdings were not in fact fixed rate holdings. He puts his argument in this way: the evidence shows, evidence which has been accepted by the lower appellate Court, that the entire areas held by the tenants are fixed rate areas, but he gives up his claim with reference to portions of that area. Therefore the remaining portion must be held to be fixed rate portions, unless the landlord succeeds in proving that they are not fixed rate portions.

The argument is an ingenious one, but in my opinion it does not deserve success. In order to enable a Court to come to the conclusion that the tenant is a fixed rate tenant it must be established that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. No doubt S. 50, sub-S. 2, lays down a convenient rule in view of the fact that it is almost impossible for the tenant to prove that he has held at a rent or rate of rent which has not been changed from the time of the permanent settlement. The legislature has laid down a convenient rule in sub-S. 2, S. 50 that the Court shall presume that he has held at a rent or rate of rent from the time of the permanent settlement if he proves that he has held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceedings. It must be remembered that the rule laid down in sub-S. 1 is a rule of law, whereas the rule laid down in sub-S. 2 is a rule of evidence which merely raises presumption that the conditions laid down in sub-S. 1 have been satisfied. In my opinion as soon as it is conceded that the rule laid down in Cl. 2 is a rule of evidence, it must follow that anything which affects any portion of that evidence must affect the remaining portion of that evidence. In this case the evidence, if it can be accepted, goes to show that the

entire area is held at a fixed rate; but it is conceded that a portion of it is not held at a fixed rate. In my view it is impossible to come to the conclusion that the remaining portion of the land is held at a fixed rate. The plaintiff comes to Court with a specific case that he holds specific plots of land at a fixed rate. The lower appellate Court has come to the conclusion that he has not been able to satisfy that Court that he has held those specific plots of land which he has enumerated in his plaint at a fixed rate. In my view therefore this appeal must fail and is dismissed with costs. The judgment will govern all the analogous appeals.

V.S./R.K.

*Appeals dismissed.***A. I. R. 1919 Patna 309**

DAS, J.

Purgan Pande and others—Appellants.

v.

Dhanpat Tewari and others — Plaintiffs—Respondents.

Appeal No. 182 of 1918, Decided on 14th July 1919, from appellate decree of Sub-Judge, Shahabad, D/- 27th September 1917.

(a) Evidence Act (1 of 1872), S. 115—Question of estoppel must arise out of pleadings—No facts alleged suggesting estoppel—Court will not consider it.

A question of estoppel can only be raised by pleading, and where no facts are pleaded which would enable a Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit, the Court will refuse to go into the matter. [P 310 C 1]

(b) Evidence Act (1 of 1872), Ss. 19 and 20—Admissions or compromise by landlord is not binding on tenant.

An admission made by a landlord is not binding on his tenant, and this being so, a compromise entered into between the proprietors of certain land and others, whereby the parties to the compromise become joint proprietors of the land, has no binding effect upon tenants of the land. [P 310 C 2]

(c) Evidence Act (1 of 1872), S. 115—Sale statement—Statements in, are not binding on auction-purchaser—Civil P. C. (5 of 1908), O. 21, R. 66.

An auction-purchaser of land is not bound by a statement in the sale certificate as to the situation of the land purchased by him. [P 310 C 2]

(d) Civil P. C. (5 of 1908), S. 100—Findings of fact however erroneous are conclusive.

A finding of fact by a lower appellate Court, however erroneous, will not be disturbed in second appeal. [P 311 C 1]

*Parmeshwar Dyal—for Appellants.**Kulwant Sahai and Shivanandan Rai—for Respondents.*

Judgment.—This appeal arises out of a suit brought by the respondents against the appellants, who were defendants 1, 2 and 3 in the suit, for the following reliefs: (1). That it may be decided that the disputed land, whereof boundaries and details are given below, forms the plaintiffs' Gujasta Kasht land as it was purchased by them in an auction-sale; that defendant 4 has no raiyati right therein and that it is in Touzi No. 6059, of the milkiat of defendants 5 and 6. (2). That it may be decided that the said land is not in Touzi No. 6057, the milkiat of defendants 1 to 3, that it is not in the joint takhta, that defendants 1 to 3 have no right to get rent for the said land, that the decree obtained by defendants 1 to 3 against defendant 4 for arrears of rent is fraudulent, and that defendants 1 to 3 have no right to get the disputed land sold in execution of the aforesaid fraudulent decree. (3). That on a consideration of the above the execution and sale proceedings in Execution Case No. 525 of 1915 be stayed until the disposal of this suit by sending a rubkar to the 3rd Court of the Munsif therefor. It will be noticed therefore that the plaintiffs in the action are seeking first of all to establish their raiyati interest in the land in dispute as against defendant 4 as the purchasers from him, secondly to establish that their holdings are in Touzi No. 6059 and not in Touzi No. 6057, and, thirdly they are seeking to get a declaration that the decree and execution proceedings obtained by defendants 1, 2 and 3 against defendant 4 are fraudulent.

Defendants 1, 2 and 3 entered appearance, and they contested the suit on the ground that the decree obtained by the plaintiffs against defendant 4 was entirely fraudulent and that by virtue of the purchase made by the plaintiffs they never obtained possession of the holding belonging to defendant 4, and that the plaintiffs have never been accepted as tenants by the defendants. They put forward the title of defendant 4 to the land in dispute and they assert in emphatic language that in spite of the purchase made by the plaintiffs, they have a right to realize rent from defendant 4 so long as they do not admit the plaintiffs as their raiyats. This is how I read para 12 of the written statement. Therefore on the pleadings between the parties the whole question was, was the purchase

made by the plaintiffs a genuine purchase and whether defendant 4 was a tenant in possession of the land in dispute. It is obvious to me that the plaintiffs have been put forward by defendants 5 and 6, whereas defendants 1 to 3 are championing the cause of defendant 4. The lower appellate Court has found that the land in dispute falls within Touzi No. 6059, the patti owned by defendants 5 and 6, and is not included in Touzi No. 6057, the patti owned by defendants 1 to 3, and that the plaintiffs have been recognized as tenants by defendants 5 and 6. The lower appellate Court has come to this conclusion on a consideration of the Amin's report to which, it appears, no valid objection was ever taken by the appellants and on a consideration of oral evidence. The lower appellate Court finds that the respondents are in possession of the land in dispute by paying rent to defendants 5 and 6. On these findings it would seem that there is no merit in this appeal and that the same ought to be dismissed by this Court. But the learned vakil appearing on behalf of the appellant has argued this appeal as a first appeal and has asked me to consider the various documents in the case, which he says were not considered by the lower appellate Court. His point is that the plaintiffs, having purchased the interest of defendant 4, are estopped in this suit from denying the title of defendants 1, 2 and 3 to the land in dispute. I have always understood that a question of estoppel can only be raised by pleading and that if no question of estoppel has been raised in the pleadings, the Court will refuse to go into the matter, because after all the doctrine of estoppel is merely an extension of the doctrine of admission which depends on the facts of each case, and that the Court is clearly unable to examine the facts unless those facts are pleaded. No doubt there is a stereotyped plea that the principle of estoppel is applicable to the suit, a plea which is to be found in every printed copy of written statement available in the mofussil Courts, but no facts are pleaded in the written statement which would enable the Court to come to a conclusion whether the principle of estoppel is or is not applicable to the suit.

On the contrary the whole written statement shows that the plaintiffs have no right at all to the land in dispute and

that defendant 4, in spite of the purchase made by the plaintiffs, still continues as the tenant on the land and is liable to the defendants for rent. In my opinion it is not open to the defendants on this written statement to argue the question of estoppel. They emphatically assert that defendant 4 is still a tenant and that the plaintiffs have nothing to do with the land in dispute. I do not think that they can now turn round, because the findings of the Courts below are against them, and say that the plaintiffs are their tenants and must pay rent to them. But I do not propose to decide the question on a technical point. I desire to examine the ground on which it has been argued by the learned vakil that the principle of estoppel is applicable to this suit. He says, first of all, that the proprietors of the land, that is to say, defendants 1, 2 and 3 on the one hand and defendants 5 and 6 on the other hand entered into a compromise by which they became joint proprietors in respect of the land in suit. The argument is that the tenant is bound by the compromise entered into by the landlords. I am unable to agree with the learned vakil that an admission made by a landlord is binding on the tenant at all.

Secondly, it is argued by the learned vakil that the sale certificate obtained by the plaintiffs shows that the land in dispute is situated in Touzi No. 6057 as well as in Touzi No. 6059. No doubt the sale certificate shows that, but I am unable to hold that because the sale certificate shows that the property in dispute is partly situated in Touzi No. 6057, therefore the plaintiff, who is a complete stranger to the land, must be bound by a statement appearing in the sale certificate, especially when the Amin's report shows that no portion of the land is situated in Touzi No. 6057. I do not think that even if the lower appellate Court has misconstrued these documents, necessarily the judgment of the lower appellate Court must and ought to be set aside. These are items of evidence which have to be considered along with the other evidence admitted or proved in the case. The lower appellate Court has considered a very important piece of evidence, that is to say, the Amin's report, to which, as the lower appellate Court says, no valid objection was taken at any time. The lower appellate Court fur-

ther considered the oral evidence in the case. I cannot say, reading the judgment of the lower appellate Court, that it did not consider the documents on which the learned vakil so strongly relies. In my opinion the finding of the lower appellate Court, however erroneous it may be, is a finding of fact which is binding on me. I would therefore dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 311

COUTTS AND ADAMI, JJ.

Jago Singh and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 207 of 1919, Decided on 23rd July 1919, against order of Sess. Judge, Monghyr, D/. 1st May 1919.

Criminal P. C (5 of 1898), S. 350—*De novo* trial started—Magistrate on retransfer cannot start from stage where he left it—He must also conduct *de novo* trial.

When on the transfer of a Magistrate a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out, and S. 350 gives no jurisdiction to such Magistrate on his retransfer to the district to proceed with the trial from the point where he had left it. [P-311 C 2]

Gour Chandra Pal and Harihar Prasad Sinha—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Coutts J.—The petitioners in this case, Jago Singh and Hurnandan Singh, have been convicted under S. 325, I. P. C. Jago Singh has been sentenced to two years' rigorous imprisonment. It appears that north of the petitioner's house there is a plot of parti land which is claimed by both the complainant in the case and by the present petitioners. On this land and close to the wall of the petitioners' house the complainant dug the foundation for a cowshed. After the trench for the foundation had been dug, and while the complainant was away, the two petitioners came and began to fill up the ditch, one with a kodali and the other with his hands. While they were doing this, the complainant came on the scene and struck the petitioner Jago with a lathi. Hurnandan went into his house and fetched out a spear with which he attacked the complainant and some others who were with him, and then Jago went into the house and fetched out a sword with which he also attacked them.

The result was that the complainant and his friends were severely wounded. Three points are urged before us on behalf of the petitioners. First, that they have not exceeded the right of private defence; secondly, that the procedure adopted in the trial is wholly illegal, and thirdly, that the trying Magistrate went and inspected the locality and, without making any report of his proceedings or what he saw, has imported the result of his inspection into his judgment. There does not appear to be any force in the first contention. It may be that the petitioners have a claim to the land upon which the complainant dug the trench, but they had no right to go into their house and fetch out a deadly weapons and with them to attack the complainant.

On the second point however it appears to me that the petitioners must succeed. What happened is this: The case was first taken up by the Asst. Magistrate Mr. Thadani and the whole of the prosecution witnesses were examined and cross-examined. At this stage Mr. Thadani was transferred and the Subdivisional Officer withdrew the case to his own file. In accordance with their right under S. 350, the accused demanded a *de novo* trial. The trial was accordingly started again and was proceeded with by the Subdivisional Magistrate, who examined some of the prosecution witnesses. Mr. Thadani then again returned to Monghyr and the Subdivisional Magistrate retransferred the case to his file, with the direction that he was to take it up from the point where he, Mr. Thadani, had left it. This Mr. Thadani did. He finished the trial and the petitioners were convicted and sentenced as has already been stated. The procedure adopted is wholly illegal. When the Subdivisional Magistrate took the case on his own file and started the trial *de novo*, the proceedings before the Asst. Magistrate were wiped out and S. 350 gave the Asst. Magistrate no jurisdiction to proceed on the evidence which he had already recorded when the case was retransferred to him again. It is not a case covered by S. 350 at all. Consequently the question of material prejudice does not arise. In this view of the case it is unnecessary to consider the last point which has been urged. I would only say that the Asst. Magistrate should have made a record of what he

observed and what he did at the time of the local inspection. The conviction and sentences must therefore be set aside and the case remanded for rehearing.

Adami J.—I agree.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 312 (1)

CHAMIER, C. J. AND SHARFUDDIN, J.

Hira Lal Singh and another—Decree-holder—Appellants.

v.

Ramjiram—Judgment-debtor — Respondent.

Misc. Appeal No. 41 of 1915, Decided on 9th February 1917, from order of Sub Judge. Patna, D/- 9th January 1915.

Civil P. C. (5 of 1908), O. 21, R. 18—Set off—Both decrees need not be before Court for execution if one is made not executable before other is passed.

Where a landlord holds a decree against his tenant for rent, and the latter holds a decree against his landlord for mesne profits, but there is a direction in the decree for rent that execution is not to issue until the amount due under the decree for mesne profits is ascertained the intention is that the decrees should be set off against each other. It is not necessary, in such a case, that the decrees on both sides should be before the Court for execution as required by O. 21, R. 18, in order that a set-off might be claimed. [P 312 C 2]

Kulwant Sahai—for Appellants.

Lachmi Narain Sinha—for Respondent.

Chamier, C. J.—The respondent held decrees for rent amounting to Rs. 2,000 against his tenant Tipan Prasad Singh. The latter, who held a decree against the respondent for Rs. 11,125 on account of mesne profits, sold it to the appellants who applied for execution by sale of some property of the respondent. The Court below has held that the amount due on the decree held by the respondent should be set off against the amount due on the decree held by the appellants and that the latter should be allowed to execute their decree for the balance only. Hence this appeal.

The appellants are, *prima facie*, bound to allow the set-off, but they contend that the set-off should not be allowed inasmuch as the respondent has not applied for execution of his decrees. O. 21 R. 18, no doubt contemplates that the decrees on both sides are before the Court for execution, i. e., that both sides shall have taken out execution. But the circumstances of the present case are peculiar. The High Court, when affirm-

ing one of the decrees for rent, said that execution should not issue until the amount of mesne profits due under the decree in favour of the appellants had been ascertained. Evidently the intention was that the decrees should be set off against each other. If the Court below had ruled that a set-off could not be allowed inasmuch as the respondent had not taken out execution, the respondent would have taken out execution at once. In consequence of the decision of the Court below the respondent has not taken out execution. It is quite clear that the decrees held by the parties should be set off against each other as far as possible and all parties understood that this would be done. In these circumstances we dismiss this appeal but we make no order as to costs.

Sharfuddin, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 312 (2)

ROE AND COUTTS, JJ.

Lutan Pandey—Plaintiff—Appellant.

v.

Prayag Pandey—Defendant—Respondent.

Appeal No. 484 of 1917, Decided on 18th July 1918, from appellate decree of Dist. Judge, Gaya, D/- 3rd March 1917.

Specific Relief Act (1877), S 54—Suit for injunction restraining priest from officiating in private houses or for account of earnings is not maintainable.

No suit for an injunction restraining a party from officiating as a priest in private houses is maintainable, nor will any suit lie against any member of a family of priests for an account of earnings in any specified area. [P 313 C 1]

Mohammad Fakhurddin and Tribhuban Nath Sahay—for Appellant.

Siva Narain Roy for Bandyannath N. Singh—for Respondents.

Judgment.—In this case the facts have been fully stated in the judgment of the learned District Judge. The suit was one for enforcement of a partition both of the family jagirs and of the family birt, the parties being priests. The learned District Judge has decreed the whole of the plaintiff's suit for separate possession of specific portions of the jagir lands and for mesne profits with regard thereto; these mesne profits to be ascertained in execution. Upon this part of the case the appeal is not pressed and it is obvious that the decision of the lower appellate Court is on the facts final.

Exception is taken to an injunction granted by the learned District Judge restraining the defendants from trespassing on certain areas within which the plaintiffs are, by the terms of the partition deed, entitled to sole control over the jaimans, and for an ascertainment of the earnings from the area during the three years prior to the suit. It was clearly laid down in *Hira Pandey v. Bachu Pandey* (1) that no suit for a declaration of a right to officiate in private houses was maintainable, and it follows that no suit for an injunction restraining a party from officiating in private houses is maintainable, nor will any suit lie against any member of a family of priests for an account of earnings in any specified area. The case of *Oochi v. Ulfat* (2) is authority only for the proposition that certain sums can be levied in accordance with the contract made. The relief given therefore in the shape of an injunction and an account of earnings must be discharged, without prejudice to any suit which the plaintiffs may be advised to bring with regard to their share of any specific fees which they may definitely state to have been received contrary to the contract of partition made. The appeal is decreed in part in these terms. The parties will bear their own costs throughout.

V.S./R.K. *Appeal partly decreed.*

(1) [1916] 1 P. L. J. 381=35 I. C. 345.

(2) [1898] 20 All. 234.

A. I. R. 1919 Patna 313

DAWSON-MILLER, C. J. AND FOSTER, J.

Ahmed Husain and others — Defendants—Appellants.

v.

Ghulam Ali Ashgar—Plaintiff—Respondent.

Second Appeal No. 524 of 1918, Decided on 9th August 1919.

Benami—Setting aside—Transferor can set aside transfer to defeat creditors before fraud is accomplished—Fraud.

A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Courts will not assist either party claiming under such a transaction. (P 316 C 1)

Muhammad Hasan Jan—for Appellants.

K. Sahai, G. D. Singh and Ragho Prasad—for Respondent.

Dawson-Miller, C. J.—This is an appeal by the defendants from the decision of the Officiating District Judge of Muzaffarpur, dated 24th September 1917, reversing a decision of the Additional Subordinate Judge, dated 24th February 1917.

The suit was instituted by the plaintiff on 10th June 1915 claiming a declaration of title to a 4 annas 13 gandas 1 cowrie 1 krant share of Mauza Chak Kazi Nizam bearing Touzi No. 10005 recorded in the name of the defendants as proprietors, and confirmation of his possession. He further claimed a declaration that he was entitled to get his name registered in the mutation department in respect of the disputed share and the removal of the names of the defendants and an injunction restraining them from proceeding with a partition suit before the Collector in respect of the share in dispute. The plaintiff is admittedly the proprietor of the remaining 11 annas odd comprising 16 annas of the Touzi number in question. The entire property was originally an 8 annas pucca share of the said village and belonged to one Sheikh Kutubuddin, the ancestor of both the plaintiff and the defendants. Kutubuddin left three sons and one daughter, who upon his death succeeded to his 8 annas share of the property, each of the sons taking 2 annas 6 gandas 2 cowries 2 krants and the daughter 1 anna. One of the sons, Kasim Ali, is the grandfather of the present plaintiff. Another of the sons, Zahur Hussain, is the grandfather of defendant 1. The third son, Athar Ali, transferred his share to his widow Bibi Rahiman by a baimokasa deed in the year 1842. The plaintiff's case is that Bibi Rahiman acquired in addition to the share of her husband the 1 anna share of Bibi Bahorun, the daughter of Kutubuddin as well as the 2 annas 6 gandas odd share of Zahur Hussain by transfer from his son Bande Ali, the father of defendant 1, that Kasim Ali's share passed to Muhammad Haji and Muhammad Makbul, his two sons, the father and uncle of the plaintiff, and the latter having died his share as well as that of Muhammad Haji devolved upon him, the plaintiff, that Bibi Rahiman transferred the whole share which she had acquired from her husband, her sister-in-law Bibi Bahorun and Bande Ali, amounting to

5 annas 13 gandas odd, to Muhammad Haji and Muhammad Makbul, the father and uncle of the plaintiff, in the year 1855.

The uncle died childless and consequently in due course the whole 8 annas share originally held by Sheikh Kutubuddin thus came into the possession of the plaintiff on the death of his father Muhammad Haji. This 8 annas share, which was part of Touzi No. 1162 of the village in question was in the year 1863 formed into a separate patti bearing Touzi No. 10005. This partition was made at the instance of the plaintiff's father Muhammad Haji, and the plaintiff's case is that his father and uncle remained in undisturbed possession of the whole property down to the year 1876. In that year the entire patti was brought to sale in execution of a decree obtained by one Mathura Das against the plaintiff's father and uncle and was purchased by one Nandan Lal. Before the sale objections were taken to the attachment of the property in the name of Bande Ali, claiming as proprietor of the 2 annas 6 gandas odd share which he had inherited from his father and by two sisters of the plaintiff's father under S. 278 of the old Code of Civil Procedure.

These objections were disallowed and two regular suits were instituted on behalf of the respective objectors setting up a claim to portions of the property. Notwithstanding these suits however the sale proceedings were continued and the property was sold and purchased by Nandan Lal. The decree-holder Mathura Das was originally the principal defendant in these suits, but after the sale the auction-purchaser Nandan Lal was made the principal defendant. The judgment-debtors, the plaintiff's father and uncle, were also defendants in the suit. The suit brought in the name of Bandan Ali was subsequently settled by the auction-purchaser confessing judgment in favour of the plaintiff Bande Ali and it was ordered that according to the confession of judgment by Nandan Lal, a decree for declaration of title in favour of Bande Ali should be passed. The plaintiff's case with regard to this suit and the circumstances attending it is that it was in the first instance an attempt instigated by his father and uncle to endeavour to save their property from attachment by setting up Bande Ali as

a claimant to the 2 annas 6 gandas odd share which still remained recorded in his name, that the auction-purchaser Nandan Lal was under an obligation to the plaintiff's father who was a hakim and in the habit of attending Nandan Lal in that capacity, and that in order to discharge his obligation he consented to transfer the purchased property back to the plaintiff's father, but that instead of executing a kobala in favour of the plaintiff's father for that purpose, he confessed judgment in the suits brought both by Bande Ali and the two sisters of the plaintiff's father in respect of the shares claimed by them and with regard to the remaining shares he executed a kobala in favour of one Akbar Ali, a friend of his, as benamidar for the plaintiff's father. The object of this was according to the plaintiff's case, that Muhammad Haji, the plaintiff's father was desirous of keeping this particular property out of the hands of his creditors. The evidence shows however that there was in fact no fraud perpetrated on any of the creditors of Muhammad Haji as they were all paid off and subsequently Akbar Ali transferred his share by a ladavi deed to the plaintiff in 1897 and about the same time the shares of the two aunts of the plaintiff were also recorded in the name of the plaintiff's wife. The share of Bande Ali, however, remained recorded in his own name, although it is the plaintiff's case that both he and his father before him were in sole possession and control of the property and that Bande Ali was merely their benamidar, and it was not until the year 1914 when ill feeling arose between the plaintiff and the defendants that the latter endeavoured to get possession of the share recorded in their name by filing a petition for partition before the Collector. Hence the present suit claiming a declaration of the plaintiff's title.

Before the Subordinate Judge the main issues were, first whether the 5 annas 13 gandas odd share transferred by Bibi Rahiman to the plaintiff's father and uncle in 1855 included the 2 annas 6 gandas odd share of share of Bande Ali, and secondly, whether the compromise in the suit of 1876 made between Nandan Lal and Bande Ali was really part and parcel of a benami transaction wherein Bande Ali was acting merely

as the benamidar of the plaintiff's father. With regard to the first point there was no direct documentary evidence showing a transfer of Bande Ali's share to Bibi Rahiman before 1855, and the only documentary evidence in support of this was a petition in 1861 whereby the plaintiff's father applied for registration of his name in respect of the 5 annas 13-gandas odd share purchased from Bibi Rahiman, in which he recites that this covered, in addition to the 2 annas 6 gandas odd which she received from her husband, the 2 annas 6 gandas transferred by Bande Ali as well as the 1-anna share transferred to her by Bibi Baharun. As the whole share of the family was an 8-annas share and as Bibi Rahiman admittedly acquired 3 annas 6 gandas odd from her husband and Bibi Baharun, there was no other source from which she could have acquired the other 2 annas 6 gandas odd making up the 5 annas 13 gandas, except from Bande Ali unless she acquired Kasim Ali's share, and there was no evidence to show that Kasim Ali ever parted with his interest. On the other hand, the oral evidence went to show that Kasim Ali's share descended by inheritance to the plaintiff's father and uncle and ultimately to the plaintiff. The Subordinate Judge found all issues in favour of the defendants and dismissed the suit.

The District Judge took a different view of the facts and came to the conclusion that the plaintiff had made out his title to the whole 8 annas share including that originally held by Bande Ali, and that the transaction which took place at the date of the suit brought by Mathura Das in 1876 was a benami transaction in which Bande Ali merely represented the plaintiff's father. It has been urged before us on behalf of the appellants that there is no real evidence to support these findings. It is contended that the recitals in the petition of 1861, when the plaintiff's father applied for registration of his name, are not admissible in evidence against Bande Ali and as no deed of transfer by Bande Ali to Bibi Rahiman has been produced, there is nothing from which it can be inferred that Bande Ali ever did in fact part with his share. The plaintiff's case was that the deed of transfer had been lost but that nevertheless from all the circumstances of the case a legitimate inference might be

drawn that his father had in fact acquired from Bibi Rahiman the share which originally belonged to Bande Ali and as the transfer of a 5 annas 13 gandas odd share from Bibi Rahiman had undoubtedly been proved and as he acquired by inheritance the 2 annas 6 gandas odd share of his grandfather Kasim Ali, this accounted for the whole 8 annas share. The further fact that Muhammad Haji in 1863 without any intervention on the part of Bande Ali had applied for and obtained a batwara rubkar whereby the whole 8 annas share was divided into a separate patti supported this view. The learned District Judge did not come to any definite finding on this part of the case but based his decision upon the fact that when Mathura Das obtained his decree against the plaintiff's father and uncle in 1876 and got an attachment of the whole 8 annas share which was purchased by Nandan Lal, the arrangement then came to whereby Nandan Lal confessed judgment in the suits brought against him was an arrangement whereby it was intended to transfer the property to the plaintiff's father in the benami name of Bande Ali and others.

It is unnecessary to deal in detail with the evidence relied upon in support of this conclusion. There was undoubtedly evidence to support it to which the learned Judge refers. The only real attack made by the appellants against this part of the judgment was first that it was not competent to the plaintiff to contend that Bande Ali was acting as his benamidar, as the plaintiff's father admittedly lent himself to this transaction with a view to defeating his creditors; and secondly, that the decree in the suit brought by Bande Ali against Nandan Lal and the plaintiff's father and uncle in 1876 was *res judicata* and binding on all parties to that suit including the plaintiff's predecessors-in-title. In support of the first contention the applicants rely upon the case of *Yaramati Krishnayya v. Chundru Papayya* (1), where it was held under circumstances somewhat similar to the present that a plaintiff who had transferred his land to another in order to defeat an attaching creditor, the creditor subsequently consenting to a decree upholding the title of the transferee, was not entitled to a declaration that his name should be retained on the

(1) [1897] 20 Mad. 326.

register as owner when the transferee had applied to be registered in his place. The authority of this case has been questioned and dissented from in the later case of *Jadu Nath Poddar v. Rup Lal Poddar* (2) where Rampini and Mookerjee, JJ., held that where the mere intention to commit a fraud has not been carried into effect, a beneficial owner is entitled to sue for a declaration that a deed of transfer executed by him was merely a benami transaction. Although there has been some diversity of opinion upon the question, I think the decision in the later case expressed the true view. A transfer which is merely colourable and made with the intention of defrauding creditors can always be set aside by the transferor at any time before the fraud has actually taken place. But if the fraudulent intention has succeeded, the Courts will not assist either party claiming under such a transaction. In the present case it is shown that nobody in fact was defrauded and that the creditors of the plaintiff's father were all paid off. In my opinion the principle relied upon by the appellants on this part of the case has no application to the present circumstances.

With regard to the second point the question whether Bande Ali was acting as benamidar for the plaintiff's father was not raised or decided in that suit. The decree was merely passed in favour of the plaintiff upon the confession of judgment by Nandan Lal, the principal defendant. There seems to be no reason why the present plaintiff should be estopped from contending that Bande Ali was merely his benamidar. In my opinion this appeal fails and must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

(2) [1906] 33 Cal. 967.

A. I. R. 1919 Patna 316

DAWSON-MILLER, C. J. AND ROE, J.

Raghuber Das Mahant—Appellant.

v.

Nataber Singh and another—Respondents.

Second Appeal No. 2 of 1918, Decided on 4th April 1919, against judgment of Dist. Judge, Sambalpur.

Contract Act (9 of 1872), S. 23—Money paid under contract tainted with fraud or immorality cannot be recovered, e g. agree-

ment to bring about adoption of a particular person.

The Courts in India will not assist a party to recover back his money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. [P 316 C 1]

An agreement by the priest or spiritual adviser of a Hindu lady to use his influence to bring about the adoption by the lady of a particular person is illegal, immoral and opposed to public policy and any money paid under the agreement cannot be recovered. [P 316 C 1]

Bajraj Chowdhury—for Appellant.

Janakinath Bose—for Respondents.

Dawson-Miller, C. J.—This is an appeal from a decision of the District Judge of Sambalpur, dated 21st November 1917, affirming a decision of the Subordinate Judge, dated 4th July 1917. The plaintiff, who is the respondent in this suit, brings an action to recover back a sum of Rs. 5,000 paid to the defendant, in consideration of an agreement, by the defendant, who was the spiritual Guru of the Rani Sahib of Kauria, to bring about the adoption by that lady of one of the plaintiff's sons. The contract which was entered into between the parties is in the nature of a receipt for Rs. 5,000 signed by the defendant. After acknowledging the receipt of the money the defendant agrees within two months to cause one or other of the plaintiff's sons, whichever he shall desire, to be adopted by the Rani of Kauria and after bringing about the adoption to cause a written intimation about it to be sent to Government as well as to the plaintiff, and then it provides if he fails in this then the defendant shall refund the entire amount of Rs. 5 000.

It is important to note at the outset that the cause of action upon which the plaintiff's claim is based is a breach of this contract itself. He refers in his plaint to the contract and to the stipulation as to repayment of the Rs. 5,000 in the event of failure to bring about the adoption. The plaintiff then goes on to say that the defendant failed to fulfil the work undertaken by him for which he had received the money and therefore he became liable to return the money, the stipulated time having expired and he further states that he has several times applied for the return of the money but the defendant has refused to part with it. Then he served him with notice and he relies upon that breach of the contract whereby the defendant undertook either

to bring about the adoption within two months or to return the money as his cause of action.

The defence put forward by the defendant was that he never received the money at all and that he never agreed to get either of the plaintiff's sons adopted or to refund the money in case of failure. He does say however that the plaintiff requested him to use his influence as spiritual guide of the Rani to induce her to adopt one of his sons, but that he declined to do so, and in the alternative there is a plea that the contract relied upon by the plaintiff was void as being immoral and opposed to public policy and that no suit would lie to enforce such a contract. It was found as a fact in both Courts below that the contract was entered into by the defendant. It was contended at the trial by the plaintiff first of all that this contract was not an illegal or immoral contract or one opposed to public policy. That question was decided against him by both the learned Subordinate Judge and the District Judge of Sambalpur. Before this Court it has been but faintly argued. As to this I do not think I can do better than refer to that part of the judgment of the Subordinate Judge which deals with this question. I think he puts it very clearly. After stating in his judgment that an agreement tending to create an interest against duty is opposed to public policy, he goes on in this way:

"To see whether the object in this case was opposed to public policy two things are to be considered. In the first place an adoption by a Hindu female should only be made for the spiritual benefit of her husband and she should only choose such a boy as is best fitted for the purpose, unfettered by any pressure from outside. That being the case, any attempt made to fetter her choice in any way must be considered to be opposed to the spirit of Hindu law and also opposed to public policy. In the second place, it is to be borne in mind that in the present case the defendant is her Guru whose duty it is to give her good and impartial advice. That being the case, the acceptance of money by that Guru even to plead any particular cause must place the latter in a false position. His personal interest in this case would be so to advise his chela as to secure to him the enjoyment of the benefit. That being the case, the payment of money to the Guru for that purpose is sure to tend to create an interest in the matter that is opposed to his duty, and, as such, a contract which has this for its object is opposed to public policy."

I entirely agree with that statement of the case put forward by the Subordinate Judge and I think in the particular facts

of this case that one may go even further. In the latter part of his judgment the Subordinate Judge says that he has no doubt in his mind that the object of the agreement was illegal, immoral and opposed to public policy and that as such the agreement was void, and it does seem to me that to pay a sum of money to the priest and spiritual adviser of the lady in order to bring about an adoption of a particular person is, to put it quite shortly, a matter of bribery and an attempt to corrupt the spiritual adviser to use his influence to do something which is entirely contrary to his duty.

Having decided however that this was a contract opposed to public policy, both the learned Judges of the Courts below came to the conclusion that, although they were very loth to do so, they were really bound by certain decisions of the Courts in this country to permit the plaintiff to recover back the money and the way the case was put on behalf of the plaintiff and accepted by the Judges of the lower Courts was this: that where money is paid for an illegal purpose, which is not countenanced by law or which is contrary to public policy, then at any time before the object for which the money is paid is carried out, although the Courts will not assist either party in enforcing performance of the contract, nevertheless they will assist the person who has paid the money to recover it back. There are no doubt cases which have been referred to which support the proposition. Most of the cases in this country are cases of what in England would be called marriage brokerage contracts where money is paid to the parent or guardian of a boy or girl in order to bring about a marriage between the boy or girl and the girl or boy of the person paying the money. In the case of *Ram Chand Sen v. Aulaito Sen* (1) Sir Richard Garth, C. J., although in fact he was not satisfied that the contract there was a contract contrary to public policy, did lay down the rule that, even if it were so, in a case of that kind the money could be recovered back at any time before the consideration for the payment of that money had been performed.

It was not necessary in the facts of that case to go so far, because it was not held that the contract was, as I have

(1) [1884] 10 Cal. 1054.

said, contrary to public policy, but that case has been the foundation for a series of other cases in this country and I think it is too late now to question the validity and propriety of those rulings. At the same time it must be pointed out that in more than one case it has also been clearly stated that if the contract involves anything in the nature of criminality or is one of moral turpitude such as the Courts on that ground would refuse to enforce, then not only will the Court refuse to enforce the contract, but it will not assist either party to recover back anything paid under the contract. It is not always easy to say what cases do come under that description, but that the rule does exist in this country I do not think can be questioned. In the case of *Bakshi Das v. Nadu Das* (2) decided by Mukherjee, J., the proposition is laid down that although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually paid pursuant to the agreement, if the contract is broken and the marriage does not take place. But in a later case, *Ledu v. Hira Lal Bose* (3), the same learned Judge qualifies that general proposition in these words:

"We are not unmindful that there are exceptions to the general rule that money paid or personal property transferred in accordance with the terms of an illegal contract cannot be recovered, notwithstanding the other party refuses to affirm his part of the agreement. It is plain that, although where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back, yet this exception will not be allowed if the agreement is actually criminal or immoral."

In this case the principle is clearly laid down that the Courts of this country will not assist a party, even though the contract has not been performed, to recover back his money paid in respect of a contract which is tainted with criminality or immorality.

It seems to me therefore that the only question which we have to consider is whether in the particular circumstances of this case one must come to the conclusion that this is merely that class of contract which the Court refuses to en-

force on the ground that it is contrary to public policy, such as gaming and wagering contracts or certain classes of marriage brokerage contracts, or whether there is not something more in this case which taints it from the beginning with something in the nature of criminality or moral turpitude. Speaking for myself, it seems to me that this is just one of that class of cases which the Court will refuse to have anything to do with at all because it is in my view a grossly immoral act to endeavour to bribe a priest to use his spiritual influence with his chela in the interests of the person bribing him and if the plaintiff comes and asks us to assist him in any way in carrying out the terms of such a contract or to recover back money paid under it, I think the Court ought to refuse.

There is only one other matter which I should like to draw attention to. This is not, as the action is framed, one of those cases where the plaintiff has sought to repudiate the contract before it has been performed and claims to recover back the money paid for an illegal performance before the mischief has been done, because from the manner in which the claim is framed in the plaint the plaintiff is clearly claiming after the time for performance has elapsed, something in the nature of damages for failure to perform the contract. The damage has been estimated at the amount which he paid and which the defendant stipulated to pay him back in the event of his failure. It is for a breach of one of the stipulations in that contract that the plaintiff is now suing and he has not up to the present time purported to repudiate the contract and recover back the money on the ground that the contract was illegal or contrary to public policy ab initio. So far as the plaintiff and the defendant themselves are concerned, I can see little or no distinction as to the part which each of them took in this transaction. To my mind it was one of gross immorality. I think both of them are equally to blame and there is nothing to choose between them. In this view of the case it seems to me that the decision of the Court below, which was come to with some reluctance by the learned District Judge, must be set aside and that the appeal must be allowed and judgment entered for the defendant. But in the circumstances of the case we do not think

(2) [1905] 1 C. L. J. 261.

(3) [1916] 43 Cal. 115=29 I. C. 625.

that any order ought to be made as to costs.

Roe, J.—I agree. I am satisfied that no distinction can be made between an agreement to bring about a marriage and an agreement to bring about an adoption and after reading the decision in the case of *Hermann v. Charlesworth* (4), I am of opinion that the Calcutta High Court has rightly held that money paid as consideration for bringing about a marriage or adoption may be recovered. But this is subject to the rule of *ex turpi causa*. I entirely agree with the learned Chief Justice that this is a case in which the Court should not interfere for fear of sullyng its hands. I regard the contract as one made by a man of position to induce another to prostitute his religious calling for his benefit for a bribe of Rs 5,000.

V.S /R.K. *Appeal allowed.*

(4) [1905] 2 K. B. 123.

A. I. R. 1919 Patna 319

MULLICK, J.

Eqbal Khan—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 96 of 1917, Decided on 23rd April 1917, against order of Sess. Judge, Purneah, D/- 24th January 1917.

(a) Criminal P. C. (5 of 1898), S. 202—Disposal without examining complainant antecedent to ordering inquiry is without jurisdiction—Subsequent examination does not help.

A Magistrate has no jurisdiction to dispose of a complaint without examining the complainant on oath antecedent to ordering an inquiry under S. 202, Criminal P. C., nor can this primary absence of jurisdiction be cured by examining the complainant subsequent to the inquiry. [P 320 C 2]

(b) Criminal P. C. (5 of 1898), S. 202—Transfer of case under S. 192—Process issued to complainant's witnesses does not alter nature of transfer.

The fact that a Magistrate before transferring a complaint under S 192, for inquiry and disposal, issues processes upon the witnesses of the complainant, does not materially alter the nature of the transfer, nor does it affect his jurisdiction. [P 320 C 1]

(c) Criminal P. C. (5 of 1898), Ss. 190 and 202—Noncognizable offence—Magistrate can take cognizance on police report under S. 190—He cannot then hold judicial inquiry under S. 202.

A duly empowered Magistrate may take cognizance of a noncognizable offence on a police report under S. 190 (b), but in that case he must immediately summon the accused. He cannot hold a judicial inquiry under S. 202. [P 320 C 2]

(d) Criminal P. C. (5 of 1898), Ss. 195 and 476—Sanction to prosecute under S. 195 with an order directing prosecution under S. 476 is illegal.

There cannot in the same proceeding be a sanction under S. 195, and an order for prosecution under S. 476. [P 320 C 2]

(e) Criminal P. C. (5 of 1898), S. 476—Order under S. 476 is not appealable.

A Sessions Judge has no jurisdiction to deal in appeal with an order of a lower Court passed under S. 476. [P 320 C 2]

Mustafa Khan—for Petitioner.

Manohar Lal—for the Crown.

Judgment.—The petitioner in this rule lodged an information before the police charging certain persons with committing dacoity. The police investigated the charge and found it to be false and reported the matter to the Subdivisional Magistrate of Purneah, requesting that the petitioner might be prosecuted under S. 211, I. P. C., for preferring a false charge. In the meantime the petitioner lodged a petition before the Subdivisional Magistrate maintaining that his information to the police was true and asking that that an inquiry might be made into the complaint. The Subdivisional Magistrate thereupon, on 8th of September 1916, directed that the petition should be treated as a complaint and should be inquired into judicially and on 22nd September, he issued processes upon the petitioner's witnesses for an inquiry to be held on 18th of October. On 30th October, when the witnesses of the petitioner were present in Court, the Subdivisional Magistrate transferred the case to a Deputy Magistrate directing him to inquire and pass final orders in the case.

The Deputy Magistrate thereupon made an inquiry, examined the witnesses, and finally on 4th of December 1916, dismissed the petitioner's complaint under S. 203, Criminal P. C., He also added the following order:

"Enter maliciously false, S. 395, I. P. C. I sanction prosecution of *Eqbal Khan* under S. 211, I. P. C. Draw up proceedings accordingly."

The petitioner thereupon appealed to the Sessions Judge. The proceedings of the learned Judge are not very intelligible, but in the result he appears to have expunged from the judgment of the learned Deputy Magistrate the following words:

"I sanction prosecution of *Eqbal Khan* under S. 211, I. P. C."

If the learned Judge was under the impression that the learned Deputy Magis

trate had sanctioned the prosecution of Eqbal Khan under S. 195, Criminal P. C., and had also at the same time instituted proceedings under S. 476, Criminal P. C., he obviously was in error. There could not in the same proceeding be a sanction and an order for prosecution under S. 476, Criminal P. C., and the learned Judge's order directing that, so far as the sanction was concerned the judgment of the learned Deputy Magistrate should be set aside, seems to have been totally misconceived. The fact was that the order of the learned Deputy Magistrate was nothing more or less than an order under S. 476, Criminal P. C., and therefore the learned Judge had no jurisdiction to deal with it in appeal. The learned Judge was not competent merely upon the consent of the Government Advocate to expunge certain words from the order. If the order was one under S. 476, Criminal P. C., the learned Judge had no jurisdiction.

If it was one under S. 195 then the learned Judge had jurisdiction and in clear terms should have declared whether the proceedings against the petitioner were quashed. The learned Judge's proceeding however does not materially affect the matter now before me. Treating the order of the learned Deputy Magistrate as an order under S. 476, Criminal P. C., the question that I now have to determine is whether that order was made with jurisdiction. Now it appears that the petition or complaint, which was made to the Subdivisional Magistrate by the petitioner asking for an inquiry, was transferred to the learned Deputy Magistrate under S. 192, Criminal P. C. The learned vakil for the petitioner contends that the transfer was made under S. 202, and not under S. 192, and that all that the learned Deputy Magistrate was competent to do was to make an inquiry and return the papers to the Subdivisional Magistrate; but that clearly is not correct. The learned Subdivisional Magistrate transferred the complaint for disposal by the Deputy Magistrate and directed him to pass final orders. The fact that the learned Subdivisional Magistrate issued processes upon the witnesses of petitioner does not materially alter the nature of the transfer. The issue of processes was perhaps premature, but it in no way affected the jurisdiction of the Deputy Magistrate to

deal with the complaint according to the terms of Ch. 16. The fatal objection however to the proceedings of the learned Deputy Magistrate is that he omitted to examine the complaint and that under the terms of S. 202, Criminal P. C., until he did so examine the complainant, he had no jurisdiction whatsoever to dispose of the complaint. Therefore in the present case, although the learned Deputy Magistrate has made an elaborate inquiry, that inquiry is wholly without jurisdiction and infructuous. It will not avail to seek to cure the defect by examination of the complainant at the present stage, for jurisdiction founded upon the examination of the complaint subsequent to the inquiry will not cure the primary absence of jurisdiction. It is unfortunate that the proceedings of the learned Deputy Magistrate have to be set aside, but there is no help for it.

Then the learned Deputy Government Advocate urges that although the proceedings may not have been strictly in accordance with law under the provisions of S. 202, Criminal P. C., yet the Subdivisional Magistrate and through him the Deputy Magistrate had jurisdiction to inquire on the footing that the Subdivisional Magistrate may be said to have taken cognizance of the police report under S. 190 (b), Criminal P. C. It is undoubtedly true that a Magistrate duly empowered may take cognizance of a noncognizable offence on a police report under S. 190 (b), Criminal P. C., but in that case he must immediately summon the accused, and he cannot under the provisions of the Criminal Procedure Code proceed to hold a judicial enquiry as was done in the present case. The proceedings of the learned Sub Divisional Magistrate and the learned Deputy Magistrate clearly indicate that cognizance was taken of a complaint under S. 190 (a) and that the transfer was made under S. 192. The result therefore is that the order directing the prosecution of the petitioner must be set aside and that the whole proceedings be recommenced from the stage at which the petitioner made his complaint. The Subdivisional Magistrate will examine the petitioner on oath as required under the terms of S. 200, Criminal P. C., and will then proceed to dispose of the complaint according to law. If it is still found that the complaint is false and that the petitioner

should be prosecuted for making a false charge under S. 211, I. P. C., a proceeding should be drawn up as required by S. 476, Criminal P. C., and submitted to the nearest First Class Magistrate as required by that section. I have directed the Subdivisional Magistrate to deal with the case himself, because having regard to the extra-judicial enquiries which the learned Deputy Magistrate has made, it is not desirable that he should again hear the case.

V.S./R.K.

Order accordingly.

A. I. R. 1919 Patna 321

DAS, J.

Sadhu Charan Singh—Petitioner.

v.

Udho Prasad Singh—Opposite Party.

Criminal Revn. No. 224 of 1919, Decided on 4th August 1919, against order of Sess. Judge, Arrah.

(a) Criminal P. C. (5 of 1898), S. 476—Information laid before Magistrate with view that he should take action found on inquiry by police to be false—Prosecution started under S. 182, I. P. C., held to be valid.

Accused presented a petition before a Magistrate, stating that a certain person was collecting men and that the accused was under the apprehension that the object was to cause him some injury, and asked that an inquiry might be made through the police. After the inquiry the Magistrate, holding that the petition was false and vexatious directed the prosecution of the accused for an offence under S. 182, I. P. C..

Held: that the accused having given information to a Magistrate which had been held to be false and which was intended to cause the Magistrate to use his lawful powers to the injury or annoyance of another within the meaning of S. 182, I. P. C., the order directing the prosecution of the accused could not be said to be illegal.

[P 322 C 1]

(b) Criminal P. C. (5 of 1898), S. 439—Order otherwise legal cannot be interfered with merely on ground that different conclusion from facts can be drawn.

The mere fact that the High Court would if dealing with a certain matter, have come to a conclusion different from that arrived at by a Subordinate Court is no reason for setting aside in revision an order which is not illegal.

[P 322 C 2]

Yunus and Parmeshwar Dayal—for Petitioner.

Government Advocate—for Opposite Party.

Judgment—This application is directed against an order passed by the Subdivisional Officer of Arrah giving sanction for the prosecution of the petitioner under S. 476, Criminal P. C., for having committed an offence under S. 182, I. P. C. There was an application against this

order before the learned Sessions Judge of Arrah, but the learned Sessions Judge thought that the finding of the learned Subdivisional Officer was perhaps open to objection on the ground of vagueness. But he saw nothing illegal in the Magistrate's procedure which would warrant a reference under S. 438, Criminal P. C. Accordingly he rejected the application.

It is argued before me by Mr. Yunus on behalf of the petitioner that the petition presented by his client before the police, which is the foundation of the proceedings against him, does not contain a single word which is false and therefore he cannot be put on trial for having committed an offence under S. 182, I. P. C. It appears that there have been various disputes between the petitioner and the daughter and son-in-law of Babu Nathuni Singh, who died leaving a will by which he bequeathed his property to his daughter and son-in-law. There have been probate proceedings between the parties and there have been various criminal disputes between the parties.

The petition presented by the petitioner before the Subdivisional Magistrate states that Udho Prasad Singh was collecting people from villages. He says that the pretext put forward by Udho Prasad Singh was that they had come for a jalsa but his apprehension was that steps might be taken against him and his relatives. He thereupon asked for an inquiry to be made at once through the Superintendent of Police as to the fact why the aforesaid person was collecting people. He then proceeds to say that his presence in the Court may be taken note of and protection afforded to him. The learned Subdivisional Magistrate thought after the police inquiry that the petition was false, vexatious and annoying, and thereupon he has granted sanction under S. 476 of the Code to prosecute the petitioner. Mr. Yunus on behalf of the petitioner argues that there is not a single statement in the whole petition which may be said to be false. There was undoubtedly he says a collection of people for the jalsa. Undoubtedly (that is his next argument) the petitioner had an apprehension in his mind that some steps might be taken against him by the people who had collected, and as he points out, there were various criminal disputes between the parties which naturally may have caused him a certain amount of

alarm. But the question still remains that he did ask for an inquiry and an inquiry was undoubtedly made by the police. Reading the petition as a whole it appears to me that he does make a charge against Udho Prasad Singh and others for having collected people from the villages for causing him some sort of harm. It is quite possible that there was some apprehension in his mind that they might really do him some harm, and it is not for me now to express any opinion on the case at all. It would not be proper that I should. But clearly there was a charge against the opposite party for having collected people from the villages to cause him injury. The question therefore is: Does it not come under S. 182, I. P. C.? The charge against him may be false; it may be proved to be false on evidence? but can I at this stage interfere with the order passed by the Subdivisional Magistrate. The learned Sessions Judge came to the conclusion that he had no power at all and in my opinion he has come to a correct conclusion on this point.

Now the question is: Did the petition give any information to any public servant which he knew or believed to be false intending thereby to cause, or knowing to be likely that it will thereby cause such public servant to use the lawful power of such public servant to cause injury to any person? That is the whole point. He undoubtedly has given information to a public servant. It has got to be determined in the trial whether that information is false or whether he believed it to be false. I cannot at this stage express any opinion on the point, nor can the learned Subdivisional Magistrate who disposed of this application. He undoubtedly made the application in order that such public servant may make an inquiry, and of course the whole subject-matter of the charge against him now is that his object was to cause the public servant to use the lawful power to the injury or annoyance of some person. I am of opinion that there is no point of law in this matter and that therefore I cannot interfere with the order passed by the Subdivisional Magistrate. The case seems to me a very trifling one and it is quite possible that no more than a technical offence under that section has been committed by the petitioner. It is quite possible that if

I had to deal with that application myself I would have come to another conclusion, but that is no ground at all for setting aside in revision an order which is not an illegal order at all. I therefore refuse the application.

V.S./R.K. *Application refused.*

A. I. R. 1919 Patna 322

MULLICK AND ATKINSON, JJ.

Sheo Prasad Koeri—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 121 of 1919, Decided on 9th July 1919, against the order of Sess. Judge, Shahabad, D/- 26th May 1919.

Criminal Trial—Confession uncorroborated but voluntary—Conviction is not bad—Retraction—Voluntary character is not taken away.

A conviction based upon an uncorroborated confession is not bad, if the surrounding circumstances point to the confession having been the outcome of a voluntary act on the part of the confessor and in the absence of any evidence of coercion either by the police or any other person. The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. [P 323 O 2].

S. Sinha and Gour Chandra Pal—for Appellant.

Asst. Government Advocate—for the Crown.

Mullick, J.—The appellant Sheo Prasad Koeri has been sentenced under S. 302, I. P. C. to transportation for life for having committed murder by causing the death of Ram Sarup Koeri on the night of 3rd April last. The motive for the crime is alleged to have been that the deceased was suspected of carrying on an intrigue with the wife of the accused, and also with a girl named Asturni who was married to the grandson of Pran Koeri, who was the master and benefactor of Ram Sarup and brother of the accused's grandfather. The body of the deceased was discovered in the sugarcane field of one Rigan Koeri on 8th April. The post mortem examination shows that death was due to strangulation probably caused by pressure of two sticks to the throat. On 10th April the accused met one Ram Autar in a neighbouring village, and on being informed by Ram Autar that the police were searching for him, the appellant agreed to make a full confession on condition that Ram Autar would take steps

to save him from punishment. Ram Autar thereupon took the appellant to Pararia, the place where the body was found and where the Sub-Inspector was conducting an investigation.

To the Sub-Inspector the appellant is alleged to have made a full confession at about 7 a. m. In consequence of that confession various persons were arrested on 11th April, and in the house of one Jagannath the appellant is said to have pointed out a lathi as one of the lathis with which the murder was committed; and also a kudali as being the instrument with which the grave, in which the deceased was buried, was dug. The appellant was detained in police custody till 5 a. m. on the 12th, when it appears he was produced before the Deputy Magistrate of Sasaram for the purpose of having his confession recorded. The Deputy Magistrate states that, being apprehensive that the accused might still be under police influence and thereby coerced into making a confession, he remanded the accused to jail for that night. On the following day after repeated warnings he recorded the statement of the accused, from which it appeared that the accused together with five others had caused the deceased to come to the house of Jagannath and had there murdered him. Both the assessors believe that story. They have accepted the confession as voluntary and have found the accused guilty. On his behalf it is urged by Mr. Sinha that the confession having been retracted before the committing Magistrate, it would be extremely unsafe to convict the accused without material corroboration. He contends that there is no material corroboration on the record. Now the wife of the deceased deposes that the deceased and Jagannath came to the house of the deceased from Paran Koeri's house where they had been attending a feast, and that after a short stay Jagannath took the deceased away to his own house, saying that they were going to listen to some singing. This is some corroboration of that part of the accused's confession which states that Ram Sarup came to the house of Jagannath on the night of the alleged offence.

Next if the evidence as to the finding of the lathi is believed, that also supplies some corroboration of the accused's story. There is also the circumstance that when the wife of the deceased first went

to the sugarcane field where the body was eventually found there was only a hand protruding out of the ground, and that as soon as the accused who was with the wife of the deceased saw it, he cried out that she had better not accuse any one and that the deceased would never return. It may be contended that all these pieces of corroborating evidence are weak and would not justify a conviction, if we were not satisfied that the confession made by the accused was a substantially true account of what actually took place. But having considered the circumstances leading to the arrest of the appellant, the period of detention in police custody, the proceedings of the Deputy Magistrate and the precautions taken by him with regard to the confession, it is impossible to believe that the confession was not voluntary, and that it was not prompted by panic or a hope of mercy. There is no evidence whatsoever of any coercion either by the police or any other person, and although a suggestion was made during the commitment inquiry and in the Sessions Court that the accused had been subjected to violence by the police, there was no evidence whatever brought in support of that suggestion. It seems that on the morning of 13th April, after putting the three preliminary questions to the accused, the Deputy Magistrate gave the accused 20 minutes' time to think over what he was about to say; and that thereupon the accused proceeded to relate the part which he had taken in the murder. In these circumstances we are satisfied that the confession, though uncorroborated, was sufficient to justify a conviction. Mr. Sinha has finally contended that the facts do not establish the offence of murder, and that having regard to the dissolute character of the deceased and the provocation given by him, there cannot be a conviction for any offence graver than culpable homicide not amounting to murder. The provocation was certainly grave, but it was not sudden, and there are no circumstances which would justify us in holding that death was not caused after full preparation and with a full knowledge that the injuries inflicted would be likely to cause death. The appellant himself according to his confession only held the legs of the deceased; while the others strangled him to death; but a conspiracy is clearly established,

and therefore the appellant must be held guilty of the act which caused death.

Atkinson, J.—I concur.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 324

MULLICK AND ALI IMAM, JJ.

Kunja Behari Singh—Appellant.

v.

Tarapada Mitra—Respondent.

Appeals Nos. 148 of 1917 and No. 43 of 1918, Decided on 12th July 1918, from original orders of Sub-Judge, Deoghur, D/- 30th January 1917.

(a) Civil P. C. (1908), O. 21, R. 5—Decree transferred to another district cannot be sent directly to Sub-Judge but should be sent to Dist. Judge who is to transfer it to Sub-Judge.

Order 21, R. 5, Civil P. C., requires that when a decree is sent for execution to another district it should be sent to the Court of the District Judge. The Subordinate Judge has no jurisdiction to entertain an application for execution of a decree transferred to him direct by the trial Court until it is transferred to him by the District Court. [P 324 C 2]

(b) Santal Pargannas Settlement Regulation (1872), S. 6—S. 6 has no application to decree passed outside Santal Pargannas—Court executing such decree in Santal Pargannas can realize full interest.

Section 6 of the Santal Pargannas Regulation has no application to a simple money-decree passed by a Court outside the Santal Pargannas against a defendant who resides in the Santal Pargannas. Nor does Cl. (b) of the section prohibit a Court in the Santal Pargannas to which such a decree has been transferred for execution from realizing the full interest under the decree. [P 325 C 1, 2]

Sakti Kanta Bhattacharya and *Panchanan Banerjee*—for Appellant.

Naresh Chandra Sinha—for Respondent.

Mullick, J.—The decree-holder Tarapada Mitra obtained a decree against three judgment-debtors in the Court of the Subordinate Judge of Hazaribagh. That decree is now under execution in the Court of the Subordinate Judge of Deoghur in the District of the Santal Pargannas. On 30th January 1917 the Subdivisional officer, acting as Subordinate Judge, made an order directing the judgment-debtor Kunja Behari Singh to pay to the decree-holder a sum of Rupees 5,660-2-9. Against this order Kunja Behari Singh prefers Appeal No. 148 of 1917, and the decree-holder prefers Appeal No. 43 of 1918. The complaint of the decree-holder is that the Subordinate Judge has given less interest than that

to which he is entitled, and that S. 6, Regn. 3 of 1872, known as the Santal Pargannas Settlement Regulation, which applies the rule of *damdupat* to money debts in the Santal Pargannas, is not applicable to this execution.

Appeal No. 148 of 1917.

We will take Appeal No. 148 of 1917 first. In this appeal the first ground urged by the judgment-debtor is that the execution case was struck off on 12th September 1916, and that as it has been neither restored nor any fresh application for execution filed, the order of 30th January 1917 was illegal and incompetent. Now the reply to this is that it appears that on 16th October 1916 the decree-holder made an application to the Court for the restoration of the case giving certain reasons for his non-appearance on the previous date of hearing. Notice was issued upon the judgment-debtors and the judgment-debtors showed cause, and although on 30th January 1917 the Subordinate Judge did not give any reasons for restoring the case, it would seem from the fact that he went into the merits of the case that he was satisfied that there were good grounds for the decree-holder's non-appearance on 12th September. Therefore although there was an irregularity in procedure on the part of the Subordinate Judge, I do not think that irregularity was sufficient to vitiate the whole order of 30th January 1917. The next objection however is more serious. It appears that the decree by the Subordinate Judge of Hazaribagh was sent direct to the Subordinate Judge of Deoghur. Now the Civil Procedure Code requires that the decree should be sent to the Court of the District Judge; who in this case was the Deputy Commissioner of the Santal Pargannas. The Subordinate Judge therefore had no jurisdiction to entertain the execution application until it was transferred to him by the Deputy Commissioner. It is true that the objection as to jurisdiction does not appear to have been taken before the executing Court, but it is open to the parties to raise the question at any stage and we fear that we must give effect to the objection. The order of 30th January 1917 will therefore be set aside as having been made without jurisdiction. The appeal is allowed with costs.

Appeal No. 43 of 1918.

In this appeal the decree-holder contends that S. 6, Regn. 3 of 1872 is not applicable to a money-decree made by a Court of competent jurisdiction outside the Santal Pargannas. On the other side the contention is that so long as the Court at Hazaribagh was making a money decree against a person resident within the district of the Santal Pargannas the Court at Hazaribagh was bound by S. 6. Now the learned vakil in support of this contention relies upon the case of *Maha Prasad Singh v. Ramani Mohan Singh* (1), but that case has no bearing upon this case. In that case a suit upon a mortgage in respect of lands situated within the Bhagalpore and Santal Pargannas districts was instituted in the Court of the Subordinate Judge of Bhagalpore. Their Lordships of the Privy Council held that owing to certain special laws applicable to the Santal Pargannas the suit was cognizable only by certain Courts within the Santal Pargannas District. Their Lordships also held that even if the Court at Bhagalpore had been competent to try the suit it would have been bound to give effect to the provisions of S. 6, Regulation 3 of 1872. The decision of their Lordships was founded upon the consideration that a Court at Bhagalpore in seisin of the mortgage suit would be deemed to have jurisdiction within the Santal Pargannas District because part of the mortgaged property was situated within that district. But that is not the case here. Here the Court at Hazaribagh had full jurisdiction to pass a decree upon the contract. It had no jurisdiction at all in the Santal Pargannas, and the mere fact that one of the defendants resides in the Santal Pargannas did not vest the Court at Hazaribagh with any jurisdiction in the Santal Pargannas within the meaning of S. 6, Regulation 3 of 1872.

Therefore in my opinion the Court at Hazaribagh was not bound to regard the rule of *damdupat* in this case. It is next contended that although the Court at Hazaribagh may not have been bound by S. 6, yet the executing Court at Deoghur was bound by Cl. (b) of that section. Now S. 6 merely directs that no Court having jurisdiction in the Santal Pargannas shall decree interest more than

the principal amount. It does not say that no Court having jurisdiction within the Santal Pargannas shall execute such a decree. Nor does Cl. (b) prohibit the executing Court to realize such interest. According to my reading of this clause there was no bar to the executing Courts enforcing in full the decree that it had received from Hazaribagh. Therefore if S. 6 does not operate, the executing Court must follow the ordinary rule which requires that it shall not go behind the decree. The decree-holder will therefore be competent to execute the decree which the Hazaribagh Court may transfer to the proper authority within the Santal Pargannas. The result is that the decree-holder succeeds upon the point of law which he has raised in his appeal and Appeal No. 43 of 1918 is decreed with costs. But as we have already held in the judgment-debtor's appeal that the whole execution proceeding in the Court of the Subordinate Judge was without jurisdiction, the decree-holder will not in effect derive any benefit from his success till he secures a fresh certificate addressed by the Court at Hazaribagh to the proper Court.

Imam, J.—I agree.

V.S./R.K.

Appeals allowed.

A. I. R. 1919 Patna 325

ATKINSON, J.

Asan Pandey—Defendant 2 — Appellant.

v.

Rajmon Misser and another — Plaintiff and Defendant 1—Respondents.

Appeal No. 1202 of 1917, Decided on 24th June 1919, from appellate decree of Addl. Sub-Judge, Champaran, D/- 20th August 1917.

(a) Civil P. C. (5 of 1908), O. 34, R. 1 and S. 99—Suit for redemption of mortgage — Tenant subsequent to mortgage introduced by mortgagee is necessary party.

Every interest created by a mortgagee sought to be redeemed *puisne* to his own is an interest which in a redemption suit should be represented before the Court in order to enable it effectively to give relief between the parties to the mortgage deed. Thus a tenant introduced by the mortgagee upon the mortgaged land subsequent to his mortgage is a necessary party to a suit for redemption of the mortgage. Even if he is not a necessary party, the joinder of such tenant as a party to the suit would not be a sufficient cause for dismissal of the suit on the ground of misjoinder of parties: his joinder in the suit would amount merely to an irregularity not prejudicing the trial of the merits of the case, within the ambit of S. 99, Civil P. C. [P 327 C 1]

(1) A. I. R. 1914 P. C. 140=42 Cal. 116=41 I. A. 197=25 I. C. 451 (P. C.).

(b) Civil P. C. (5 of 1908), O. 23, R. 3—**Compromise shown to be fraudulent—Court is not bound to recognize.**

A Court is not bound to pass a decree in accordance with a compromise which is shown to be fraudulent. [P 328 C 2]

Jalgebind Prosad Singh — for Appellant.

Rajendra Prasad—for Respondents.

Judgment.—This second appeal comes before me from the decision of the learned Additional Subordinate Judge of Champaran, dated 20th August 1917. The plaintiff institutes this suit claiming to exercise his right of redemption of a zarpeshgi mortgage bond dated 18th March 1882. The mortgage-bond was for a term of 38 years subject to the annual rent of Rs. 10-8-0. Defendant 1 was the original mortgagee and entered into possession of the mortgaged premises, and defendant 2 claims to be a tenant on the mortgaged property. Defendant 1 does not contest this suit. The action proceeded to trial upon the defence filed by defendant 2. Defendant 2 put forward two defences: (1) that he was not a necessary party to the suit, and (2) that the mortgaged property had been settled with him by the plaintiff's predecessor-in-title as tenant prior to the creation of the mortgage security dated 18th March 1882. The learned Munsif decided both these issues in favour of the respondent, and granted a decree for redemption coupled with a direction that on the payment of the mortgage money or the balance thereof due by the plaintiff, he should be entitled to khas possession of all the land which formed the subject-matter of the mortgage security discharged from the claim of defendant 2 in respect thereof. From this decision defendant 2 appealed, and in appeal the Additional Subordinate Judge arrived at the conclusion that no settlement was ever in fact made with defendant 2 by the plaintiff or his predecessor-in-title prior to the date of the mortgage bond. The learned Subordinate Judge in my opinion gives very cogent reasons for concurring in the findings of fact arrived at by the learned Munsif.

In second appeal three objections have been urged against the validity and legal propriety of the decision of the learned Subordinate Judge. It is contended, first of all, that the judgment of the learned lower appellate Court is not a judgment in accordance with law. I utterly fail

to appreciate this contention because in my opinion the learned Judge clearly shows by his judgment that he has carefully considered the material parts of the evidence dealing with the issue as to whether any letting had been created by the plaintiff or the plaintiff's predecessors-in-title with defendant 2 prior to the date of the mortgage security. The learned Judge, to my mind, satisfactorily shows that defendant 2 became tenant of the mortgaged premises subsequent to the date of the mortgage security and that defendant 2 was then joint with the original mortgagee in mess and estate, and that collusively in the year 1898 the mortgagee in possession of the mortgaged property got defendant 2 recorded as tenant in respect thereof for a period of seven years. The subsequent Record of Rights only carries this collusive entry one step further. The learned Subordinate Judge rightly laid great stress upon the fact that defendant 2 dare not pledge himself on oath to the defence which he pleaded in his written statement relative to the alleged creation of a letting made to him by the plaintiff prior to 18th March 1882.

I see no reason for holding that the learned Additional Subordinate Judge's judgment is unsatisfactory in any sense whatsoever. In my opinion, being a judgment of affirmance, it satisfies all the requirements of the law. Secondly, it is contended before me that defendant 2 was not a necessary party to the suit, and that therefore the suit is bad for a misjoinder of parties and that the plaintiff's claim should have been dismissed. I gather from the judgments of the lower Courts that this point was not pressed or urged before either the Munsif or the Additional Subordinate Judge. Before me however the matter has been strenuously argued and the learned vakil appearing on behalf of defendant 2 contends that even assuming that defendant 2 was a tenant on the lands, under and by virtue of a letting made to him by the mortgagees in possession subsequent to the date of the mortgage security, that nevertheless he is not a person having an interest in the mortgage security which would justify his being made a party under the provisions of O. 34, R. 1, Civil P. C. In addition it is asserted that where a tenancy is created by a mortgagee in possession in favour of a tenant

on the mortgage property, such tenant is not a person having an interest in the mortgage security whom in a suit for redemption it would be necessary to add as a party.

Now it must be remembered that this suit is not a suit by way of ejectment; but a suit by a mortgagor claiming to redeem his property from the mortgage debt which was created in this particular case on 18th March 1882. As I understand the law, the foundation of the right of a mortgagor to redeem is that upon payment to the mortgagee of the debt due by the mortgagor, the mortgagor shall be then restored by way of redemption to the lands which he pledged as security for the mortgage-debt, free and unfettered from the creation of any rights by the mortgagee puisne to such mortgage, save such obligations and rights as a mortgagee by Statute may create. No authority has been cited in support of the contention addressed to me on behalf of the appellants. But in Mr. Ghose's book on Mortgages, Edn. 4, at p. 586, there is a passage which rather tends to support the view pressed by the respondents, viz., that all persons having an interest of any kind in the mortgage property sought to be redeemed are necessary parties in a redemption suit.

This certainly conforms with my own view of what the law is. In my opinion the case of *Hood v. Easton* (1) tends to show that every interest created by a mortgagee sought to be redeemed puisne to his own is an interest which in a redemption suit should be represented before the Court in order to effectively give relief in a redemption suit between the parties to the mortgage deed. But even if the addition of defendant 2 as a party to the suit was unnecessary, and in that sense there was a misjoinder of parties, it would merely mean that the provisions of S. 99, Civil P. C., apply to the facts of this case. S. 99 provides that:

"No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

In my opinion the provisions of that section of the Code apply with great force and effect to the facts of this particular

case, because even if defendant 2 was not a necessary party, in my opinion his representation as a party in no way prejudiced the trial of the merits of the suit in so far as the suit has been decreed in favour of the plaintiff-respondent. These were the two issues arising for decision in this second appeal as originally presented to this Court. Pending the hearing of the appeal, the plaintiff and defendant 2 entered into the terms of a compromise embodied in a petition dated 3rd April 1919. By this petition of compromise the parties agreed that the plaintiff should recognize defendant 2 as tenant of the premises originally offered as security by the mortgage deed of 18th March 1882; and that defendant 2 should pay to the plaintiff the annual yearly rent of Rs. 10-8-0, being the rent recorded in respect thereof as being payable in the Record of Rights. The date of this compromise is of vital importance, viz., 3rd April 1919. It is contended before me that the parties to the suit having entered into a compromise that this Court is, by virtue of the provisions of O. 23, R. 3, Civil P. C., bound to accept the compromise and to pronounce a decree in accordance therewith.

This case originally came before Das, J., and upon defendant 2 applying to have a decree pronounced in accordance with the terms of the compromise one Baldeo appeared and protested, claiming that the original plaintiff to the suit had no right to enter into the compromise which he did with defendant 2, inasmuch as the plaintiff had in the month of August 1918 sold all his estate and interest in the properties in suit to one Ramphal Pandey. Baldeo purchased from Ramphal Pandey on 8th November 1918 his interest in the premises which he had purchased from the plaintiff, and the sale deed between Ramphal Pandey and Baldeo was effected by a registered deed of conveyance; and consequently it was contended by Baldeo that the compromise between the original plaintiff in the suit and defendant 2 was clearly fraudulent in its design, inasmuch as the plaintiff had no right, title or interest whatsoever in the property in respect of which he sought to confirm and ratify a letting already made to defendant 2. Baldeo applied to this Court for leave to be substituted as a party on the record.

(1) [1856] 2 Jur. (n. s.) 729.

Das, J., conceived that Baldeo had an interest, and a very vital interest in contesting the validity of the compromise dated 3rd April 1919 and he permitted Baldeo to apply to the Registrar to be substituted as a party.

The learned Registrar declined to add Baldeo as a party, upon the ground that Baldeo had been guilty of laches in not proceeding at an earlier date to have himself substituted as a party upon the record. From the order of the learned Registrar there was an appeal to a Division Bench of this Court, and my learned brothers Roe and Jwala Prasad, JJ., conceived that Baldeo was entitled to be added as a party and by their order dated 15th April 1919 they so directed, although they admitted that he had been guilty of some remissness, but that under the circumstances they considered he was entitled to assume that the original plaintiff would bona fide conduct the litigation then pending in this Court in an honest, open and fair-handed manner, but now that Baldeo had discovered that the plaintiff was acting fraudulently in defeasance of Baldeo's legal rights, that therefore he was a proper party to be substituted on the record. The question which I have to consider now is, whether the compromise of 3rd April 1919 ought to be made a decree of this Court. Under the provisions of O. 23, R. 3, Civil P. C., the learned vakil appearing on behalf of defendant 2 contends that his client dealt with the original plaintiff in the suit believing he had title, believing him to be an honest man, and that under the provisions of O. 41, the rights which had accrued to him under the compromise ought not to be taken from him.

One might be inclined to attach some weight to that argument if it was founded upon any substratum of truth or fact; but it appears in this case that early in the present year a contest arose between Baldeo on the one hand and defendant 2 on the other, in which or out of which a proceeding under S. 145, Criminal P. C., was instituted, and in which proceeding Baldeo claimed possession of the land in suit as a purchaser from Ramphal Pandey, who was the purchaser from the plaintiff in the original suit, and the defendant was the opposite party in the proceeding under S. 145. Therefore I hold that defendant 2 had notice of Baldeo's prior title, and that he must be

deemed to have known that on 3rd April 1919, when the compromise was entered into between the original plaintiff on the one hand and himself on the other, that the original plaintiff in the suit had no right, title or interest whatsoever in himself whereby he could make or enter into a valid, lawful and binding contract creating a tenancy in respect of the lands in suit. I hold that the compromise of 3rd April 1919 did not sanction or create a lawful and binding contract between the parties thereto. It was a contract designed and conceived in fraud; and it is not such a contract as this Court under the provisions of O. 23, R. 3, Civil P. C., is bound to accept and pronounce a decree in the terms thereof. Accordingly I hold that the three contentions submitted to me on behalf of defendant 2 as appellant in this case are unsustainable in point of law and I would dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 328

DAS, J.

Mahabir Singh and others — Petitioners.

v.

Deoki Rai—Opposite Party.

Civil Revn. No. 235 of 1918, Decided on 7th July 1919, from decision of Sub-Judge, Muzaffarpur.

Bengal Tenancy Act (8 of 1885), S. 155—Decree under S. 155—Court has power for enlargement of time even if landlord has obtained possession in execution.

A Court has power to entertain an application by a tenant judgment-debtor for enlargement of time to pay a sum of money awarded to the landlord decree-holder in a decree under S. 155, even if the decree-holder has applied for execution of the decree and, as a matter of fact, has obtained possession of the property in execution.

[P 329 C 2]

Rajendra Prasad—for Petitioner.

Harnarayan Prasad — for Opposite Party.

Judgment.—The petitioner challenges the validity or the legality of an order passed by the Subordinate Judge of Muzaffarpur granting an extension of time to the opposite party to comply with an order passed under S. 155, Ben. Ten. Act, and directing that the opposite party be restored to possession. It will be convenient to give certain dates.

It appears that on 15th March 1915 the petitioner obtained a conditional decree for ejectment against the opposite party under S. 155, Ben. Ten. Act. The decree provided that Rs. 20 should be paid as compensation to the plaintiff, and it directed the defendant to remove the disputed huts from the land in dispute within one month from the date of the decree. There was an appeal against this decree, which was dismissed on 7th January 1916. It appears that on 22nd January 1916 the opposite party deposited the money in Court but did not remove the huts as directed by the decree of the Munsif. On 18th August 1916 the petitioner applied for execution of the decree and on 29th August 1916 the opposite party applied for extension of time, to enable him to remove the huts, before the learned Munsif. On 31st August 1916 the learned Munsif did grant an extension of time to enable the opposite party to remove the huts. There was an appeal from the order passed by the learned Munsif, which appeal succeeded. There was a second appeal to this Court which was dismissed on 28th February 1917, but the High Court dismissing the second appeal expressly gave the opposite party power to apply for extension of time before the District Judge, but on 2nd April 1917 the petitioner was put in possession of the property. On 5th August 1918 the District Judge dealt with the application presented before him on 24th March 1917 and by his order he extended the time to enable the opposite party to comply with the decree of the Munsif passed on 15th March 1915 and further directed that the opposite party should be put in possession of the property. The petitioner before me complains against this order passed on 5th August 1918 and urges that the learned District Judge had no jurisdiction to pass an order extending the time after he had been put in possession of the property by the order of the Court executing the decree.

In the case of *Syam Mandal v. Sati Nath Banerjee* (1) Mookerjee, J., held that it is competent to the Court to entertain an application for enlargement of time after the expiry of the period described in the decree and even after the decree-holder has applied for execution. The learned vakil appearing on behalf of

(1) [1917] 44 Cal. 954=38 I. C. 493.

the petitioner concedes this proposition, but he argues that there is no power in a Court to enlarge the time after possession has been taken by a party in terms of the original decree. It appears that in the case just cited possession had, as a matter of fact, been taken by the decree-holder, for at p. 533 (of 24 C. L. J.) the learned Judge says:

"An order will also be made that the petitioner be forthwith restored to possession, and such order will be executed by the Court below as a decree of this Court."

The true view seems to me to be what Mookerjee, J., states at p. 532, that is to say:

"A remedial provision of this character should be construed liberally so as not to restrict the remedy and fetter the discretion of the Court."

It seems to me that taking possession of the property is a part of the execution proceeding and if it is held that a Court has power to entertain an application for enlargement of time even if the decree-holder has applied for execution, it seems to me that the Court is equally competent to entertain an application for enlargement of time even if the decree-holder has obtained possession of the property. Of course the matter is one of discretion and the Court will exercise that discretion on all the materials before that Court. But in my opinion, there is no question of jurisdiction involved in this matter. That being my view, I would refuse this application with costs, which I assess at two gold mohurs.

V.S./R.K. *Application rejected.*

A. I. R. 1919 Patna 329

DAWSON-MILLER, C. J. AND ROE, J.

Madanmohan Panigrahy—Appellant.

v.

Bandu Barik and another—Respondents.

Misc. Appeal No. 12 of 1918, Decided on 14th April 1919, from appellate order of Dist. Judge, Cuttack.

(a) Landlord and Tenant—Under-raiyat.

An under-raiyat has no transferable interest in his holding unless it is proved by custom to be transferable. [P 330 C 1]

(b) Landlord and tenant—Under-raiyati interest—Sale in execution of money decree can be objected to.

An under-raiyat can object to the sale of his under-raiyati interest in execution of a money decree against him. [P 330 C 1]

(c) Civil P. C. (1908), S. 100—Question of law based upon a question of fact not raised in lower Courts cannot be raised.

In second appeal the High Court cannot deal with a question of law the determination of which is based upon a question of fact not raised in the Courts below. [P 330 C 1]

S. N. Sen Gupta—for Appellant.

G. C. Ray—for Respondents.

Roe, J.—The appellant in this case is dissatisfied with an order of the District Court of Cuttack decreeing an appeal made by the judgment-debtor against an order of the Munsif, First Court of Cuttack, putting up to sale his occupancy right and under-raiyati holding in execution of a money decree. It is accepted by the learned vakil for the appellant that in view of the recent decisions of this Court the order regarding the occupancy right as made by the District Court was a correct order but it is contended that the District Court was wrong in preventing the sale of the under-raiyati holding held by the judgment debtor. It is further urged that the appeal to the District Court was ab initio incompetent by reason of the fact that it was out of time, the order of the Court below not having been filed along with the memorandum of appeal. We may deal shortly with the latter contention. There is nothing whatever upon the order sheet of the learned Judge to indicate the basis of the ground here taken. There is nothing in the argument before the learned Judge to indicate the nature of the defect now urged before us, and it is impossible for this Court to deal with a question of law the determination of which is based upon a question of fact which has not been ventilated in the Court below. With regard to the question, whether an under-raiyati holding can be sold in execution of a money decree, it is the universally accepted view that an under-raiyat has no transferable interest in his holding unless it be definitely proved by custom to be transferable. No evidence was offered upon this point in the Court below and we must therefore accept the position that this under-raiyati holding is subject to the general custom that an under-raiyati has no transferable interest therein. This appeal is dismissed with costs.

Dawson-Miller, C. J.—I agree.

V.S./R.K.

Appeal dismissed.

*A. I. R. 1919 Patna 330

MULLICK AND JWALA PRASAD, JJ.

Amrit Sonar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 22 of 1919, Decided on 25th March 1919, against order of Sess.-Judge, Bhagalpur, D/- 18th December 1918.

(a) Penal Code (45 of 1860), Ss. 235 and 243 — Counterfeit coins — Imitation of Crown and surrounding decorations is sufficient.

In order that coins may be counterfeit, it is not essential that they should exactly resemble genuine coins, or that they should be of silver and not of some other inferior metal. It is sufficient if they are of the same size as the King's coins and bear the imitation of the Crown and surrounding decorations as are found in a genuine coin. [P 331 C 2]

(b) Penal Code (45 of 1860), Ss. 235 and 243 — Counterfeit coins and mould for counterfeiting found in verandah of house occupied by Hindu joint family—Possession of managing member cannot be presumed.

Some counterfeit coins and a mould for counterfeiting were found buried under the floor of the verandah of a house occupied by a Hindu joint family and the father as the head and managing member of the family was convicted of being in possession of the articles found. It appeared that the verandah was used by the son of the accused as a shop, while the father looked after cultivation, and excepting the discovery of the articles, there was no evidence to account for their presence, or of the accused having been seen possession of counterfeit coins or instruments for coining, or that he had ever used the verandah or carried on business in the shop.

Held: that, in the circumstances, the presumption that the managing member of a Hindu family must be held to be in possession of articles found in the family dwelling-house could not be used against the accused, because (a) although as head of the family he was supposed to have control over the house, it was impossible for him to know of tiny things placed by a junior member of the family in a place which was not shown to have been under his direct control, and (b) the evidence did not exclude the possibility of the articles having been surreptitiously introduced by a stranger. [P 333 C 1, 2]

Khurshed Husnain—for Appellant.

Manohar Lal—for the Crown.

Jwala Prasad, J.—The appellant *Amrit Sonar* has been convicted by the Sessions Judge of Bhagalpur on charges under S. 235, I. P. C., of being in possession of certain instruments, to wit, moulds for the purpose of using the same for counterfeiting King's coins and under S. 243, I. P. C., of being fraudulently in possession of King's coins, namely, two whole rupees and one 1 anna piece, having

known at the time when he became possessed of them that they were counterfeit. The facts are simple. On receipt of certain information the Sub-Inspector of Partapganj Police Station came to the village of the accused with two Dafadars and two constables, on the evening of 23rd August, and stayed that night at the Gola of one Khair Singh (P. W. No. 4). He gave confidential instructions to the Dafadars to watch the house of the accused at night.

The next morning, the 24th August, he directed one Ganga Prasad Dafadar of the village, and choukidars to surround the house, and made a search of the house of the accused in the presence of some witnesses of the village namely, Khair Singh (P. W. No. 4), Bheju Labh and Rup Lal Singh. Nothing suspicious was found in the portion of the house intended for the residence of the accused and his family. The Sub-Inspector then dug the floor of an open verandah and found a small piece of dirty cloth buried underneath the floor. In the cloth there were two moulds, Exs. 1 and 2, each containing a coin—one a counterfeit rupee, Ex. 1 (a), and the other a counterfeit one anna, Ex. 2 (a), a third counterfeit rupee, Ex. 3, was also found in the cloth. The cloth was buried about one cubit deep. There were instruments found buried in another spot in this verandah, namely, a hammer and a crucible, Ex. 4. The two places were near each other. Upon the above facts the appellant Amrit Sonar and his son Kapur Chand Sonar were committed to the Court of Session. The appellant is aged 50 years and his son is aged 38 years. The trial was conducted with the aid of two assessors who returned a verdict of not guilty, being of opinion that the counterfeit coins and the moulds were placed in the accused's shop by some one else. Accepting the verdict of the assessors the learned Sessions Judge acquitted Kapur Chand Sonar, whereas disagreeing with them convicted the father Amrit Sonar, appellant, and sentenced him to two years' rigorous imprisonment under each count, the sentences to run concurrently. For the conviction of the appellant the learned Sessions Judge recorded the following finding:

"There is nothing in the trial in this Court to suggest how and when the articles could have been placed under the shop floor by others than

the accused themselves, or by one of them. The moulds are instruments for counterfeiting coins and were found in possession of the accused, who, I think, should be held to be equally guilty. The coins are counterfeit King's coin and anyone must have known when he became possessed of them that they were counterfeit. Their possession was fraudulent. If the possession of the son Kapur Chand be considered distinct from the possession of his father Amrit, he should be given the benefit of the doubt. It is stated by one witness that the father looks after the cultivation and the son works in the shop, but the evidence on the whole is that both work in the shop and this is probably the truth. Prima facie, the possession of article found in the shop would be that of the father, and I do not consider from the circumstances he was not aware of their existence. The son in the absence of any special proof may be exonerated."

The finding of the Sessions Judge that the coins are counterfeit and that the moulds were used for preparing counterfeit coins may be accepted. Prosecution witness 5, Bhado Mandal, Potedar of the Bhagalpur Treasury, whose duty is to search for counterfeit coins, says that the said coins are counterfeit and that the rupees are not of silver and are below weight and that they appear to be of lead, and that the one anna piece also appears to be of lead. The coins and the moulds were called for and produced in this Court for inspection. The inspection has confirmed the view taken by the learned Sessions Judge, which is also supported by the evidence on the record. It is not essential for coins to be counterfeit that they should be of exact resemblance of genuine coins. It is sufficient that they are such as to cause deception and may be passed for genuine coins within the definition of counterfeit under S. 28, I. P. C., *Pirbhu v. Queen-Empress* (1) and *Public Prosecutor v. Kona Thirumala Reddi* (2). It is also immaterial that they are not of silver but are of some other inferior metal. The coins bear the impression of 1906 and are of the same size as the King's coins and bear the imitations of the Crown and the surrounding decorations as are to be found in a genuine coin. The moulds are also apparently capable of turning out the counterfeit coins.

One of the rupees and the one-anna piece were actually found in the moulds held together by iron springs. There can therefore be hardly any doubt that the coins in question are counterfeit and

(1) [1899] 4 P. R. 1899 Cr.

(2) 1 Weir 219.

that the moulds were used for preparing the counterfeit coins. There can also be no doubt as to the articles having been found by the Sub-Inspector at the search under the floor in the verandah. The only question therefore to be decided in this case is whether upon the above finding the accused can be said to be in possession of the said counterfeit coins and the mould. In order to determine this point, it is necessary in the first instance to consider the position of the verandah in which the said articles were found. The verandah is separate from but close to the residential huts of the accused and his family. No plan of the verandah and the house containing the huts has been placed on the record. It may however be gathered from the evidence of the Sub-Inspector, P. W. 1, that the verandah is in the bazar and it faces south and a part of it is closed on that side with a mat two cubits high nearly reaching the eaves. There is a village path outside. There is a road on the west.

P. W. 2 says that the verandah is 15 to 26 cubits long and that it is an open one. The *hat* of the bazar is a few paces off from it. The inner apartments are enclosed. The verandah in question is used as a shop for the purposes of carrying on goldsmith's business. Excepting the discovery of the articles buried under the floor of the verandah, which was used as a shop, there is no evidence as to how the articles came to be there, or of the accused having been seen in possession of any counterfeit coin or instrument for counterfeiting coin. There is also no evidence on the record of the accused having ever been seen using the verandah, or carrying on any business in the shop. The Sub-Inspector got certain information which led him to make the search in question. The informant might have probably given some information upon this point, but he has not been examined. Of course the Sub-Inspector was not bound to examine him. The village people who are supposed to be the neighbours have not said anything in their evidence as to whether the accused was seen working in the shop, or was ever in control or possession of the articles in question. The statement of P. W. 3, Bahi Lal, that the accused (meaning both the accused and his son) are goldsmiths and work in the same shop as being father and son, as well as the statement of pro-

secution witness 4, Khair Singh, that the accused are goldsmiths and have a shop, are too vague to prove that the accused was in actual possession of the shop or carried on business there. The learned Sessions Judge himself does not definitely hold that the accused was in direct possession of the shop. He simply says that:

"the evidence on the whole is that both work in the shop and this is probably the truth."

On the other hand witness 6 for the prosecution, Ram Lal Sahu, has definitely stated that Kapur Chand, the son of the appellant, works in the shop and that the appellant looks after the cultivation and the appellant has 32 bighas of cultivation besides cattle. The learned Sessions Judge has simply stated this evidence but has not clearly rejected it, nor has he given any reason for not accepting it. Kapur Chand, son of the accused, is an elderly person, being 38 years of age, and it is not unreasonable or unusual that he should have been in exclusive charge of the shop, particularly when the cultivation of the accused is an extensive one, consisting of 32 bighas of land. Except the evidence of P. W. 6, which I have no reason to discard, the shop must be held to be in exclusive possession and control of the son of the accused and that it has not been proved that the accused had anything to do with the shop. The learned Sessions Judge himself has held the appellant responsible for the articles in question only upon the presumption that:

"prima facie the possession of the articles found in the shop would be that of the father."

The observation of their Lordships of the Allahabad High Court in the case of *Queen-Empress v. Sangam Lal* (3) may possibly lend support to the view that presumption as to possession and control of articles found in a house may be made against the house-master. Their Lordships however declined to lay down an inflexible rule, as is clear from the following observation:

"We do not lay down as an invariable rule that where weapons are found in a house occupied by a Hindu joint family living jointly, possession is necessarily that of the managing member, and the managing member only; but we do lay down that in all cases where it is sought to establish that possession and control are with some member of the family other than the managing member, there must be good and clear evidence of the fact before we can, in an act of this kind, arrive at such a conclusion. The act is

one highly penal and one which must be strictly construed": vide also *Jogiban Ghose v. Emperor* (4).

In the Allahabad case the conviction of Sangam Lal being in possession of arms without license was set aside, inasmuch as the room in which the almirah containing the arms was placed was in the occupation of the accused and Ram Chand the managing headman of the family, where other persons also had access. There were in the room a masnad and other pieces of furniture which showed that the managing member Ram Chand was in the habit of using that room. In the case before us nothing was found in the shop to indicate that the accused Amrit Lal, father of accused 2, was also using the shop, rather the positive evidence is that the appellant's son, Kapur Chand, used to work in the shop. The presumption that a managing member must be held to be in possession of the house is rebutted in the present case. It depends on the circumstance of each case. Where the articles found are large properties and placed in a conspicuous place to which the managing member may have access and over which he could exercise control and which could not be overlooked by him, the presumption against the managing member may fairly be made, as observed by Betty, J., in *Emperor v. Hari Maniram Sonar* (5). But in a case where the articles are small ones, like those in the present case, the presumption cannot be properly raised. Although the managing member as the head of the family is supposed to have control over the house, it is impossible for him to know of tiny things placed by a junior member in a place which is not shown to have been in direct control of the managing member. The case of *Emperor v. Hari Maniram Sonar* (5) appears to be similar to the present case, and the evidence in that case also appears more or less to be like what we have got in the present case. The learned Judges Betty and Aston in that case, while not agreeing as to the legal connotation of the word "possession" in Ss. 235 and 243, I. P. C., held that the evidence was not sufficient to bring home the guilt to the accused, and set aside the conviction. Aston, J., at p. 897, observed:

"The evidence cannot be said to exclude the

(4) [1909] 2 I. C. 681.

(5) [1904] 6 Bom. L. R. 887.

possibility of the articles having been surreptitiously introduced by a stranger."

This remark appears exactly to apply to the present case. In the case of *Nga San Nyein v. Emperor* (6), where the articles were found in the eaves of the kitchen and the side wall of the main building and there was some enmity, it was held that it was not improbable that the moulds were planted out of revenge and the accused knew nothing about them. In the present case there is equal, if not greater, reason to raise a suspicion that the articles found in the shop were planted there by some enemies of the accused. It is admitted by the witnesses for the prosecution, P. W. 4 Khair Singh and P. W. 6 Ram Lal, that the accused was on bad terms with certain persons in the village, notably Ram Prasad and Ganga Prasad Dafadar, who was deputed by the Sub-Inspector to watch the house the night before the search and also to surround it at the time of the search. The verandah is an open one with a village path to the south of it and a road to the west, and does not open into inner apartments of the accused which are enclosed. It would not have been difficult for anybody to plant the articles in the shop without the knowledge of the accused or his son. The evidence in the present case also shows that the moulds were rusty and therefore were not in use recently. This would show that some rusty old moulds with the counterfeit coins were newly buried in the accused's shop, as is obvious from the earth being loose at the places where the articles were found. This enhances the suspicion as to the articles having been buried by somebody other than the accused or his son. The assessors have taken this view and there is no reason why the finding of the assessors should not be accepted.

In the circumstances of the present case I am not prepared to hold that the appellant Amrit Sonar had possession of the articles or had control over them or that he had any knowledge that the articles were buried in the shop. I would therefore set aside the conviction and acquit the accused. The conviction is accordingly set aside and the accused discharged from his bail.

Mullick, J.—Although the case is one of great suspicion, I agree that it has not been established beyond all doubt that

(6) [1915] 28 I. C. 152.

the articles in question could not have been put at the place where they were found by some person other than the accused. I agree therefore that the appellant should be acquitted.

V.S./R.K. *Conviction set aside.*

A. I. R. 1919 Patna 334

DAS, J.

Rudreshwari Prasad Singh—Plaintiff
—Appellant.

v.

Dhana Mahto and others—Defendants
—Respondents.

Second Appeal No. 156 of 1918, Decided on 23rd June 1919, from decision of Dist. Judge, Bhagalpur.

(a) Civil P. C. (1908), S. 100—Construction of a document is question of law—Document misconstrued—High Court will interfere.

A question of the construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High Court will interfere in second appeal where the lower appellate Court has misconstrued the document or has made no attempt to construe it. [P 334 C 2]

(b) Bengal Tenancy Act (7 of 1885), S. 74—Rent payable, explained.

The defendant executed a kabuliyat in favour of the plaintiff covenanting to pay Rs. 167-7-5 as mal jama, the amount being made up as follows: mal jama Rs. 156-9-9; dasahra salami Re. 1, dasahra patta, Rs. 3, price of ghee Re. 1; price of dahi, Re. 1; tahrir of patwari Rs. 4-14-5; total Rs. 167-7-5. It was contended on behalf of the defendant that Rs. 156-9-0 formed the rent, and that all the other items were illegal impositions not forming part of the rent:

Held: that, on a proper construction of the document, it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain other articles, and that the total of these items was to constitute one whole rent or jama which was payable by the defendant, and that there being no indication whatever that the price of the articles mentioned was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amount claimed must be held to be part of the total rent payable for the land. [P 335 C 2]

Purnendu Narayan Sinha—for Appellant.

Lalit Mohan Ghose—for Respondents.

Judgment.—This appeal arises out of a suit by the appellant for the recovery of arrears of rent for the years 1322 and 1323 F. S., and for four-annas kist of 1321 F. S., and the only question which I have to determine is whether certain items called hak patwari, salami, etc., should be disallowed as illegal cesses or abwabs. The lower appellate Court is of opinion that they are not part of the rent

but are illegal impositions by the landlord and has accordingly disallowed those items. The whole judgment of the lower appellate Court consists of two sentences and is as follows:

"It is difficult to define exactly when items like these are really part of the rent, and in the present case I am not inclined to hold so. I prefer to follow the Record of Rights, and do not agree with the Munsif holding it to be incorrect."

Why the learned District Judge does not agree with the learned Munsif he does not say, but apparently he relies on the Record of Rights because the subject of investigation is difficult and somewhat tedious. It is greatly to be regretted that a judgment of reversal, such as the judgment of the lower appellate Court is, should be so perfunctory in its character, and I am not prepared to accept this judgment as a judgment in accordance with law. Under ordinary circumstances I would have felt compelled to return the records to the lower appellate Court in order to enable it to write out a proper judgment, but as the question involved in the appeal is a question of law and depends on the construction of a single document, I have thought it unnecessary to remand the case to the lower appellate Court. A preliminary question arises whether the finding of the lower appellate Court is a finding of fact and therefore binding on this Court:

"The question whether any particular item is, or is not, an abwab, must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed in each case is really part of the rent agreed upon to be paid as consideration for the lease": *Upendra Lal Gupta v. Ataulla* (1).

In this case there is a written contract of lease between the parties, and the rights and liabilities of the parties must depend on the construction of the document which constitutes the contract between the parties. It is well settled that a question of construction of a document, if it is a document of title and not merely a piece of evidence in the case, is a question of law, and the High Court will interfere in second appeal if the lower appellate Court has misconstrued such a document. In this case, of course, the lower appellate Court has not attempted to construe the document. It thought that it was a matter of some difficulty and therefore it threw the whole responsibility on the revenue authorities. In my opinion this is clearly

a case entertainable by the High Court in second appeal.

As I have said before the tenancy in this case commenced with a document dated 15th Aghan 1310. This is a kabuliya executed by the respondents in favour of the appellant. By this document the tenants covenanted to pay mal jama, amounting to Rs. 167-7-5 annually, together with zamindari rasum year after year as per details given. The details are as follows: mal jama, Rs. 156-9-9; dasahra salami, Re. 1; dasahra patta, 3 heads, price Rs. 3; price of ghee for Shami Puja, 1½ seer, Re. 1; price of dahi for Dasahra, Re. 1; tehrir of patwari, Rs. 4-14-5. It will be noticed that if all the items are added up, the total comes up to Rs. 167-7-5 which is described as the mal jama and which the tenants covenanted to pay "as per instalment year by year."

It is argued on behalf of the appellant that the document shows that the sums claimed are really part of the rent agreed to be paid as consideration for the lease and therefore no portion of it should have been disallowed by the lower appellate Court. The respondent however argues that the details show clearly that Rs. 156-9-0 is the rent, and that all the other items are illegal impositions not forming part of the rent but forming part of the "zamindari rasum" and that they were rightly disallowed by the lower appellate Court. The question was debated in the case of *Kalanand Singh v. Eastern Mortgage Agency Co., Ltd.* (2). In that case the lease provided that the lessee shall pay to the lessor year by year a fixed sum of Rs. 4,310, of which the sum of Rs. 4,300 was described as jama, Rs. 5 as salami touzi and Rs. 5 as "tehwari Dasahra." It was argued on behalf of the lessee that the imposition of salami touzi and tehwari Dasahra was illegal and could not be recovered by the lessor. The learned Judges in the course of their judgment said :

"Now, no doubt, if the lease had provided for an annual payment of only Rs. 4,300 and the landlord had at some subsequent date demanded from his tenant a further sum or sums by way of salami and tehwari, such additional demands, even if for some time acquiesced in, would still be regarded as abwabs or illegal cesses not recoverable in law. But where (as in the present case) the payment of these specific sums is provided for and agreed upon in the lease creating the tenancy, the stipulation for such payment is

not, in our opinion, a stipulation or reservation for the payment of arbitrary and indefinite cesses; but in the language of S. 3, Regulation 5 of 1812 is 'a definite clause in the engagement contracted between the parties,' which should be 'maintained and given effect to'."

The learned Judges proceeded to say :

"In fact the two sums now in question, though not described in the lease as rent, are in reality part of the consideration for which the tenancy was created and part of the rent agreed to be paid."

In the case of *Radha Charan Ray Chowdhry v. Golak Chandra Ghose* (3), Maclean, C. J., said that

"a fixed sum mentioned in a lease as payable annually for collection charges, in addition to rent, the total being described as the jama and forming the consideration for the lease, is not to be regarded as an abwab, but is in reality a part of the rent and recoverable as such."

The two cases above cited were considered and followed in this Court by Mullick and Atkinson, JJ., in the case of *Sadanand Tewari v. Deb Nath Manjhi* (4). The learned Judges laid down that where upon the contract entered into by the defendants it was clear that the consideration for the use and occupation of the land was a certain amount of rent in cash and the price of certain quantities of paddy or ghee or both, as the case might be, and that the total of these two items was to constitute one whole rent or jama which was payable by the defendants, and there was no indication whatever that the price of paddy and ghee was in any case intended to be an imposition independent of the rent of the land which the defendant was leasing from the landlord, the amounts claimed for ghee and paddy must be held to be part of the total rent payable for the land and the objection on the ground that the zamindar was claiming as abwabs would not be tenable. I entertain no doubt whatever that, if the test laid down in these cases be the correct test for ascertaining whether particular items claimed as rent are or are not abwabs, the items in the case before me which are objected to by the tenants must be held to be part of the rent agreed to be paid by the tenants to the zamindar and must accordingly be allowed. As I read the agreement between the parties, the items in respect of dasahra salami, dasahra patta, price of ghee and price of dahi are in substitution of a portion of rent and not in addition thereto. The total rent agreed to be paid

(2) [1913] 19 I. C. 701.

(3) [1904] 31 Cal. 884.

(4) [1917] 37 I. C. 980.

by the tenants is clearly and definitely stated to be Rs. 167-7-5, and, in my opinion it does not matter that he takes Rs. 10-14-6 out of the total rent, and not in addition thereto, under other heads, the charges being definite and certain in their nature and forming part of the consideration for the lease.

But it has been argued on behalf of the respondents that those cases were wrongly decided and that the learned Judges who heard those cases did not pay sufficient attention to two Full Bench decisions of the Calcutta High Court and a decision of the Judicial Committee in appeal from one of the Full Bench decisions. The learned vakil insists that if the principle laid down in those cases be adopted, I am bound to hold that the items claimed in this appeal are illegal impositions and cannot be allowed. Having regard to the confident manner in which the case has been argued by the learned vakil on behalf of the respondents, I have thought it necessary to deal with these cases very shortly in order to show that they were decided on their own facts and do not support the contention of the respondents.

The first case relied upon the respondent is that of *Chultan Mahton v. Tilukdari Singh* (5). In that case the plaintiff himself claimed the disputed items as Abwabs, but he insisted that he was entitled to them as they were "old usual Abwabs" and had been paid by the tenants for many years. In other words, he admitted that the items claimed by him were Abwabs, but he relied upon custom as sanctioning his demand. It was admitted in the case that the contract of tenancy did not provide for the payment of these disputed items and that these Abwabs were not consolidated with the assal rent, the only question before the Full Bench being whether, assuming that the Abwabs in question had by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs although they were not actually proved to have been paid or payable before the time of the permanent settlement. And the Full Bench had no difficulty in answering the question in the negative. It will be noticed that Sir Richard Garth presided over the Full

Bench and, in the course of his judgment, said as follows :

"They are called Abwabs by the plaintiff himself, and they are abwabs, as it seems to me, to all intents and purposes, and I consider that the Regulation 8 of 1793, as well as the Rent Law of 1859, intended to put an end to the Abwab system, and to render them illegal."

The same learned Chief Justice in the case of *Mahommed Fayez Chowdhry v. Jamoo Gaze* (6) laid down that :

"a condition in a lease that a tenant will pay to the landlord collection charges can be enforced, if the condition is definite and certain in its nature and forms part of the consideration for the lease."

I cannot think that the late Chief Justice of the Calcutta High Court intended, in the Full Bench case, to go back on his opinion expressed three years previously and to hold that even if the conditions for payment were definite and certain in their nature and formed part of the consideration for the lease, they could not be insisted upon in a suit between the landlord and the tenant if they were not called rent by the landlord. The decision of the Full Bench was affirmed by the Judicial Committee in the case of *Tilukdari Singh v. Chulhan Mahton* (7). Some of the Judges in a subsequent Full Bench case thought that the Judicial Committee went further than the Full Bench, but I cannot agree that it did. The Judicial Committee said:

"If they were payable at the time of the permanent settlement, they ought to have been consolidated with the rent under S. 54 Regulation 8 of 1793. Not being so consolidated, they cannot now be recovered under S. 61 of that Regulation. If they were not payable at the time of the permanent settlement, they would come under the description of new Abwabs in S. 55."

It seems to me that the decision of the Judicial Committee is an authority only for the proposition that if there are impositions on the tenant subsequent to the contract of tenancy, they cannot be enforced because it is impossible to say that they form part of the consideration for the lease. The next case relied upon by the respondent is that of *Radha Prosad Singh v. Bal Kower Koeri* (8). In that case the plaintiff alleged that the yearly rent of the tenant was Rs. 22-2-0. The defence was that the yearly rent was Rs. 18-10-6 and that the difference was made up of illegal cesses which were

(6) [1882] 8 Cal. 730.

(7) [1890] 17 Cal. 131=16 I. A. 152 = 5 Sar. 408 (P.C.).

(8) [1890] 17 Cal. 726 (F.B.).

(5) [1855] 11 Cal. 175 (F.).

not recoverable. The lower appellate Court came to the conclusion that the yearly rent was Rs. 18-10-6, although for years the tenant had paid Rs. 22-2-0 as rent. In coming to this conclusion the lower appellate Court relied upon the jamabandi of 1286, which showed that the rent in 1286 was Rs. 18-10-6 and that the difference was made up of various impositions and charges. So far as facts are concerned it was established therefore that the original consideration for the letting was Rs. 18-10-6 and that the difference was made up of cesses which must have been subsequently imposed by the landlord. Ghose, J., in the course of his judgment said :

"There is nothing to show that these items ever formed any part of the consideration for which the land was leased to the defendant ; for if they did, they would, I think, be really rent, though described in the zamindari papers under other denominations. They were apparently abwabs imposed subsequent to the rent being fixed at Rs. 18-10-6 ; and it is not proved that the raiyat at any time agreed to pay an enhanced rent including the said items as part of the rent."

It is difficult to see how the actual decision of the Full Bench is or can be any authority in favour of the respondents' contention, though it must be freely admitted that certain observations of O'Kinealy, J., went further than the actual decision of the case demanded. All the cases relied upon by the respondents were fully considered by the learned Judges in the case of *Kalanand Singh v. Eastern Mortgage Agency Co. Ltd.* (2). With reference to these cases, the learned Judges said as follows :

"In these cases there were no written engagements and the sums claimed represented impositions or demands made upon the raiyat defendants at various times subsequently to the creation of their tenancies and settlement of their rents. It was therefore held and no doubt properly held, that though in accordance with practice or custom the tenants had paid these impositions for a long period, yet by virtue of the provisions of Ss. 54, 55 and 61 of Regulation 8 of 1793, they were not legally recoverable."

In my opinion the cases relied upon by the respondent do not support the broad contention advanced by him and I entertain no doubt whatever that every item is recoverable as rent if it did form part of the consideration for the letting, though it might not have been described in the lease as rent. If that test is applied in this case, then, in my opinion, all the items are recoverable as rent, as

I have no doubt that the rent agreed to be paid by the tenant is Rs. 167-7-5 annually. It was next contended by the learned vakil on behalf of the respondent that in any event, the item of Rs 3 for Dasahra patta (goats for dasahra festival) must be disallowed, as goats can never stand for rent, and he relied on the case of *Gayratulla Sardar v. Girish Chandra Bhaumik* (9). It is true that that case supports the contention of the respondent, but, as no reasons are given for that decision, I cannot see on what principle that case was decided. The true test is to see, not whether any particular item is or can be rent, but whether it is in substitution of any portion of rent. If I were to disallow this item, the total rent payable by the defendant would be Rs. 164-7-5, although he agreed to pay Rs. 167-7-5 as rent. If Salami Touzi, Tehwari Dasahra and collection charges may be said to form part of rent, I cannot see on what principle it can be said that an item for Dasahra patta is not recoverable as rent. Certainly the definition of rent in the Bengal Tenancy Act does not support the contention of the respondent. Having given the subject my most anxious consideration, I have come to the conclusion that the appellant is entitled to recover every item which the respondent agreed to pay or deliver to the appellant by his kabuliyat, dated 15th Aghan 1310. I would therefore allow this appeal, set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the Court of first instance. The appellant must have his costs throughout.

V.B./R.K. *Appeal allowed.*

(9) [1908] 12 C. W. N. 175. -

A. I. R. 1919 Patna 337

MULLICK, J.

Dohra Ahir and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Revn. No. 50 of 1918
Decided on 21st January 1919, against order of Subdivisional Officer, Shahabad, D/- 30th July 1918.

Criminal P. C. (5 of 1898), S. 110 —
Omission to specify nature of evidence in notice does not vitiate proceedings—Accused taken by surprise—He has a right to ask for sufficient time to commence cross-examination of witnesses.

Where in a notice to an accused person under S. 110 it is not possible to give detailed informa-

tion as to the nature of the evidence which the prosecution intend to adduce at the trial, the omission to give such details is not an irregularity sufficient to vitiate the proceedings. If the evidence takes the accused by surprise, he has a right to ask the Magistrate for sufficient time, after the evidence has been disclosed to commence his cross-examination. But where a cross-examination is indulged in at great length and a large number of witnesses is cross-examined, the accused cannot object that he was taken by surprise. [P 338 C 1]

R. L. Dutt—for Petitioners.

Assistant Government Advocate — for the Crown.

Judgment. — This is an application relating to a proceeding under S. 110, Criminal P. C., against 11 persons. The petitioners before me are two, Dhora Ahir and Rupdhari Ahir. They attack the proceeding on the ground that the notice issued upon them is indefinite and does not comply with the provisions of S. 110, Criminal P. C. It is contended by Mr. R. L. Dutt, who appears on behalf of the petitioners, that it was the duty of the Magistrate to detail in the notice each of the particular offences in respect of which the petitioners were suspected and he relies upon the case of *Kripasindhu Naiko v. Harikrishna Naiko* (1) in support of his contention. Now the notice charges the petitioners with having been habitual robbers, receivers of stolen properties, habitually practising theft, and habitually committing offences involving a breach of the peace; in my opinion it is not possible in respect of charges such as these to give detailed information as to the nature of the evidence which the prosecution intend to adduce at the trial. If the evidence takes the petitioners by surprise, then clearly the petitioners have a right to ask the Magistrate for sufficient time, after the evidence has been disclosed, to commence their cross-examination. In the present case I find that no application for time was made, but on the contrary the mukhtar of the petitioners entered into cross-examination at great length and actually cross-examined 40 witnesses before the present application for revision was made. Therefore the objection that the petitioners were taken by surprise does not appear to me to be well founded.

Then it is contended that in the notice there was no mention of the charge that the petitioners were of a desperate and

dangerous character. Now it appears that after witness 1 for the prosecution had been examined, a witness was called for the prosecution who stated that there was material in the police report for a charge under this head. It is not known whether the trying Magistrate intends to proceed against the petitioners under Cl. (f), S. 110, Criminal P. C., and till an order under this clause is made, it is not open to the petitioners to take the objection that a joint trial in respect of a charge under this head is illegal; it may be that the Magistrate is proceeding only in respect of those clauses which permit a joint trial of several accused; therefore it appears to me that there is no error of jurisdiction. The proceeding having been regularly instituted, the question is, whether the trying Magistrate has shown bias against the petitioners so as to render himself incompetent to proceed with the trial. Now an affidavit has been filed by the petitioners charging the Magistrate with having illegally stopped cross-examination. It is said that the mukhtar for the petitioners was obliged to retire from the case because the Magistrate declined to allow him to cross-examine. The Magistrate's reply to the affidavit has been submitted to us by the District Magistrate, and it does not appear from that reply, which I accept as true and correct, that the Magistrate has been guilty of any display of animus against the accused. He cautioned the mukhtar at the beginning of the trial against irrelevant cross-examination. The mukhtar declined to go on with the case and the Magistrate persuaded him to reconsider his decision and to proceed. At a later stage again the mukhtar committed the same offence and upon the Magistrate's declining to permit irrelevant cross-examination the mukhtar withdrew from the case.

It is contended by Mr. R. L. Dutt that the Magistrate has declined to record material questions and material answers. It is impossible for me to judge upon this point, but from the report of the Magistrate this does not appear to be a correct statement of fact. If the Magistrate has irregularly shut out cross-examination, I understand that the petitioners have already placed upon the record several petitions detailing particular questions which he has declined to allow, and in the event of the petitioners being bound

(1) [1918] 47 I. C. 277.

down, they will have an opportunity of moving the District Magistrate under S. 125, Criminal P. C., and showing him the irregularity in the proceedings of the trial Court. But at the present stage I am quite unable to accede to the prayer that I should intervene and hold that there has been in fact such an irregularity in procedure that the case must be transferred from the file of the trying Magistrate to that of some other Magistrate. The learned vakil for the petitioners has also drawn attention to an incident which occurred in Court between the mukhtar and the Court Sub-Inspector in respect of a note-book. He states that this book contained police papers, and that he asked the Court to examine this book in connexion with the trial. There is nothing whatsoever to show that this book contained police papers, and the learned vakil was unable to make a definite reply when I asked him whether or not he knew as a fact that there were police papers in that book. It does not appear that the Magistrate has been guilty of any irregularity in this matter.

I have to observe in conclusion that even in this Court the petitioner's vakil has not hesitated to criticise adversely the improper conduct of the trying Magistrate. He has not hesitated to state in open Court before me that the Magistrate is under the thumb of the police. Now this observation has been made without any foundation whatsoever, and I did not expect it from a senior lawyer of the standing of the learned vakil. The application is dismissed.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 339

ATKINSON AND MANUK, JJ.

Nathun Sonar—Petitioner.

v.

Maturwa Kuer—Opposite Party.

Criminal Revn. No. 406 of 1918, Decided on 9th December 1918, from order of Sess. Judge, Arrah.

Criminal P. C. (1898), S. 488 (4)—Sub-S. 4 applies only where husband and wife live separate by free and voluntary contract—It has no application where they live apart in obedience of decree of panchayat of caste-men.

What the law contemplates by sub-S. 4, S. 488 is what is well recognized in affiliation proceedings between husband and wife under English law, namely, that where the husband and wife have lived apart by a definite contract mutually made between them affiliation pro-

ceedings are inapplicable. A contract voluntarily and freely made and entered into between the parties by reason of the ill-treatment of the husband towards his wife would be an act of their own volition. Such an agreement would be a voluntary act and contract by the parties themselves unfettered by the decree or declaration of any tribunal. [P 340 C 2]

Where however a husband and wife are living apart in obedience to the decree of a panchayat of their castemen by which the wife is awarded maintenance it cannot be said that they are living apart with mutual consent within the meaning of Sub-S. (4), S. 488. [P 341 C 1]

Sinka and Parmeshwar Dayal—for Petitioner.

Government Advocate—for Opposite Party.

Atkinson, J.—The petitioner Nathun Sonar is the husband of Mt. Maturwa Kuer. Unhappy differences have arisen between the husband and the wife, and it seems no longer possible that they can live together as man and wife. The husband is fully competent to maintain his wife. He is a man who carries on the business of money lending and he appears to be a man who has ample means and ability to pay his wife the trifling sum which has been awarded to her as a maintenance allowance but he contends that in point of law he is not liable to pay her any sum for maintenance. Owing to the continued ill-treatment which Mt. Maturwa received from her husband she invited some of her immediate castemen to bring the subject-matter of her ill-treatment by her husband before a panchayat; and accordingly in the month of December 1917 a meeting of the Panch was summoned to adjudicate upon the claim put forward by Mt. Maturwa that her husband continually ill-treated her and that therefore it was impossible for her to reside with her husband and that the husband should be ordered to make her an allowance in order that she might live apart from and independent of him.

The husband agreed to abide by the decision of the panchayat, and the matter of dispute was determined on the basis of an order or decree pronounced by the panch absolving the wife from the compulsion of living with her husband and requiring the husband to provide her with a separate place of occupation in his house and directing that he should pay her a monthly allowance of the sum of Rs. 5. The husband paid the sum of Rs. 5 for two months after the

decision of the panch, but then made default and declined to make any further payment under the decree of the panch. On 18th June 1918 Mt. Maturwa preferred a claim before the Magistrate under S. 488, Criminal P.C., asking that his jurisdiction might be invoked to award her a proper sum to be paid by her husband for maintenance. Before the learned Magistrate, and subsequently before the learned Sessions Judge of Shahabad, the point was taken that the jurisdiction conferred upon a Magistrate by virtue of S. 488, Criminal P.C., was ousted under the provisions of sub-S. 4 of that section; and that the Court had no jurisdiction to make the order sought. Sub-S. 4, S. 488 runs as follows:

"No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without any sufficient reason she refuses to live with her husband or if they are living separately by mutual consent."

The first two clauses of the section are not applicable to this case. The point that has been pressed before us by Mr. Sinha on behalf of the petitioner has reference only to the concluding clause of sub-S. 4, S. 488. It is contended that the Court's jurisdiction was ousted by reason of the fact that the husband and wife were living separately by mutual consent on the 18th June, at the time when the Court's jurisdiction was invoked to make an order for the payment of maintenance to the wife. We directed that the Crown should appear in this case so that it might be argued both on behalf of the petitioner and on behalf of his wife Mt. Maturwa and also because we considered it advisable in the interest of the public generally that a proper interpretation and construction should be put upon the meaning of sub-S. 4, S. 488. We are informed that there is no High Court ruling bearing upon the meaning of the words which now require decision. Mr. Sinha contends that inasmuch as the Musammat invoked the jurisdiction of the panch, and the husband submitted to abide by its decision that thus the husband and wife living apart in pursuance of the panch's decree were living apart under such circumstances as to constitute as between the husband and wife "a living apart separately by mutual consent." By mutual consent. These words admittedly are the governing words arising for interpretation. An argu-

ment has been addressed to us on the meaning of the words "living apart separately."

The learned Government Advocate contends that the husband and wife are not living separately in the legal acceptation of the term as employed in sub-S. 4, S. 488, inasmuch as the wife occupies an apartment reserved for herself in her husband's house. This fact appears to be incorrect; because the husband has married again since the decree of the panch, and Mt. Maturwa was then forced to abandon the accommodation reserved for her as provided by the direction of the panch. We do not think it becomes necessary to determine this point because everything must depend admittedly upon a construction of the words "by mutual consent." Now it is conceded that if a person disobeys the decree or decision of a panch, that the panch's decree can be enforced by most drastic methods. The obligation upon all castemen is to obey the order of the panch on pain and penalty of being out-casted, a matter which involves very serious consequences. In our opinion it cannot be contended that a payment made or an order obeyed in pursuance of the decision or injunction or decree of the panch, call it what you will is an act done voluntarily and by consent, as an act of free volition on the part of the person who is required to make such payment and do such act as may be enjoined or required to be done. It is rather an act done under compulsion and by the force of the authority of the panch whose decrees can be rigidly enforced.

What the law contemplates by sub-S. 4, S. 488 is what is well recognized in affiliation proceedings between husband and wife under English law, namely where the husband and wife have lived apart by a definite contract mutually made between them then affiliation proceedings are inapplicable. A contract voluntarily and freely made and entered into by reason of the ill-treatment of the husband towards his wife would be an act of their own volition; if the parties separated under such terms, so that neither should molest the other and that both should be free to live and go where and wither they respectively wished, such an agreement would be a voluntary act and contract by the parties themselves unfettered by the decree or de-

claration of any tribunal. Can it be suggested that if a husband and wife who did not agree submitted matters of dispute existing between them to arbitration and the arbitrators made a certain award and the parties thereto abided by the terms of the award and acted upon it and lived apart that the husband and wife could then be said to be living apart by mutual consent? In my humble judgment any such argument would be hopelessly untenable. It would be an act done in obedience to the award which was capable of being and which might be legally enforced. We have no doubt that the ruling of the learned Sessions Judge of Shahabad was quite correct in point of law, that nothing that happened by reason of the reference to the panch and the decree of the panch thereon and whereby the petitioner and his wife lived apart subject to his paying a maintenance allowance to her could be construed as a living apart by the two by such mutual consent as would oust the jurisdiction of the Magistrate to make the order he did.

Accordingly we hold in this case that Mt. Maturwa is entitled to a maintenance allowance to be paid by her husband to her under the order of the Magistrate dated 20th August 1918, and that the order of the learned Sessions Judge affirming the order of the Subdivisional Magistrate aforesaid is well founded and that the petitioner before us is liable in point of law to pay to his wife the sum of Rs. 5 per month as and for her maintenance. The husband has paid this sum so awarded up to the 31st October under the terms of an antecedent order made by this Court. We will remit the case back to the learned Magistrate with a direction that the arrears are to be recovered from the 31st October to date and to be recovered each succeeding month as and when they fall due under his order and we hereby declare and direct that the order of the said Subdivisional Magistrate, dated 20th August 1918, is legally operative and binding as and between the petitioner and Mt. Maturwa, unless and until good cause can be shown which would justify the setting aside of such order.

Manuk, J.—I agreed in the judgment delivered by my learned brother. In my opinion it can no more be said that the woman was living separate from her

husband by mutual consent than that the husband was paying her Rs. 5 monthly by mutual consent. In both respects to the will of the parties was superimposed the will of the panchayat as expressed in its mandate. The fallacy of the position now taken up by the petitioner is further apparent from the fact that he paid the precise amount ordered by the panches for a period of two months in order to satisfy their mandate and escape the consequences of disobedience, and from the fact that he stopped payment on the ground that his wife had since the Panches' decision become unchaste. If that allegation were true, it would absolve him from all obligation to carry out the orders of the panchayat. It was on this ground alone that he endeavoured to resist the claim of his wife in the Magistrate's Court, and it was not till he went to the Sessions Judge that he asserted that the separation and payment were by mutual consent. I have no manner of doubt that such a separation as we have here is not a separation by mutual consent. Consequently the Magistrate had jurisdiction to order maintenance.

V.S./R.K. *Application dismissed.*

* A. I. R. 1919 Patna 341

DAS, J.

Jagdeo Lal—Petitioner.

v.

Ram Lagan Singh—Opposite Party,

Criminal Revn. No. 19 of 1919, Decided on 4th August 1919, against order of District Judge, Chapra.

(a) Civil P. C. (5 of 1908), O. 41, R. 27—Evidence is to be admitted only when it is impossible to give judgment on evidence on record and not when evidence is insufficient to decide in favour of one party—There must be inherent defect in evidence recorded for allowing fresh evidence on ground of discovery of fresh evidence.

Order 41, R. 27, does not provide that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. It only provides that where it is impossible to pronounce judgment at all on the evidence, the Court might admit additional evidence.

The legitimate occasion for the use of the power conferred by O. 41, R. 27, on an appellate Court is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. [P 342 C 2, P 344 C 1]

* (b) Criminal P. C. (5 of 1898), S. 476—Fresh evidence under O. 41, R. 27, impro-

perly admitted—Prosecution on such evidence is not sustainable.

Where additional evidence is improperly admitted in appeal, the Court has no jurisdiction to direct the prosecution of a witness on the basis of such evidence and an order made under S. 476 in such a case cannot be sustained.

[P 343 C 1]

Rajendra Prasad—for Petitioner.

Gour Chandra Pal—for Opposite Party.

Judgment.—This application is directed against an order under S. 476, Criminal P. C., passed by the learned District Judge of Chapra. It is necessary to state the facts very briefly. It appears that on 17th of November 1916 Ram Lagan, who is the opposite party in these proceedings, took a zurpeshgee lease from a lady of the name of Phulesra Kuer for a consideration of Rs. 899. There were two previous mortgages affecting the property in favour of the petitioner, one for Rs. 149-14 and the other for Rs. 70, and the petitioner was in possession of the property by virtue of the two previous mortgages. It was provided in the document executed by Phulesra Kuer in favour of Ram Lagan that Ram Lagan should discharge the two debts due to the petitioner and that he should pay the lady the balance of the money. Ram Lagan tendered these two specific sums of money to the petitioner. The petitioner refused to take them, contending that on 9th November 1916, that is to say, before the zurpeshgee deed was executed in favour of Ram Lagan, Phulesra Kuer executed a sale deed in respect of the same property in his favour. He therefore claimed to be in possession of the property as and from 9th November 1916 as the owner of the property. His case is that after the execution of the document the lady would not register it and so he had the document compulsorily registered on 7th March 1917.

Ram Lagan thereupon brought the usual suit for redemption against the petitioner. The question before the learned Munsif, who tried the case in the first instance, was as to which of the documents was earlier in point of time, namely the document executed in favour of Ram Lagan on 17th November 1916, or the document alleged to have been executed in favour of the petitioner on 9th November 1916. The learned Munsif came to the conclusion that the document executed by the lady in favour

of the petitioner on 9th November 1916 was a genuine document and that therefore his document being prior in time must prevail over the document propounded by the opposite party. He thereupon dismissed the redemption suit brought by Ram Lagan against the petitioner. From that judgment there was an appeal to the Court of the District Judge of Chapra. There the learned District Judge took a course which has been described as unprecedented in the case of *Kessowji Issur v. Great Indian Peninsula Railway Company* (1). He thought that it was necessary to have some further evidence in the case and he thereupon remanded the case to the lower Court, that is to say to the Court of first instance, merely for the purpose of recording the evidence and transmitting the evidence so recorded to the Court of the District Judge.

Now it is not suggested that this evidence was tendered in the Court of first instance and was rejected by that Court. That is not the suggestion of Mr. Gour Chandra Pal, who has with my leave appeared to argue the case on behalf of the opposite party. It is not suggested by the learned District Judge that there was an inherent defect or lacuna in the evidence as it stood which prevented him from disposing of the case either in favour of the appellant or the respondent. The learned District Judge thought that further evidence was necessary. In my opinion O. 41, R. 27, gives him no power at all to remand the case to the Court of first instance for the purpose of recording further evidence. The point was discussed in the case which I have just cited and which is reported as *Kessowji Issur v. Great Indian Peninsula Railway Company* (1). I may draw the attention of the learned District Judge to the weighty words of Lord Robertson in the case which I have just cited. With reference to this very point, Lord Robertson said as follows:

"The legitimate occasion for S. 568 which corresponds to the present O. 41, R. 27, 'is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in S. 623.'"

It seems to me that it was not necessary for the Court at all to admit this

(1) [1907] 31 Bom. 381=34 I. A. 115 (P. C.).

fresh evidence in order to enable it to pronounce judgment in the case. The record was complete so far as it went; only the additional evidence might enable the learned District Judge to take another view of the case. That does not fall within the scope of O. 41, R. 27, at all. The same point has been debated in this Court in more cases than one, and I may draw the attention of the learned District Judge to the case of *Kalika Dutt Mandar v. Tulsi Mandar* (2). With reference to O. 41, R. 27, Roe J., said as follows:

"This does not mean that in order to enable the appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a document. In this case the burden of proof was upon the plaintiff and in the absence of proof of the consideration the Court was in a position to pronounce judgment in favour of the defendant. The document was not required to enable the Court to pronounce judgment. The highest at which it can be put is that it might have been required in order to enable the Court to pronounce judgment in favour of the plaintiff, which is an entirely different thing."

In this case I have no doubt at all that the fresh evidence which has been recorded by the Munsif by the direction of Mr. Monahan, the learned District Judge, might enable that Court to pronounce judgment in favour of a particular party, but that, as I have already said, is not within the scope of the section at all. The record as it stood enabled the learned District Judge to pronounce judgment in the case: that being so, that question arises whether the order passed by the learned District Judge sanctioning the prosecution of the petitioner under S. 476, Criminal P. C. is a proper order. In my view only one answer can be given to this question, namely that it is not a proper order and cannot be sustained. It is clear to me that the learned District Judge formed an opinion on this matter on evidence which he had no jurisdiction to take in the case at all. In my opinion therefore the order against the petitioner must be set aside and I order accordingly.

V.S./R.K.

Order set aside.

(2) [1917] 1 Pat. L. J. 435=37 I. C. 1008.

A. I. R. 1919 Patna 343

DAWSON-MILLER, C. J. AND COUTTS, J.

Lal Nilmani Nath Sahi—Appellant.

v.

Baldeo Das Bista—Respondent.

Misc. Appeal No. 16 of 1919, Decided on 31st January 1919.

Civil P. C. (5 of 1908), S. 151, O. 16, R. 5—Execution under the Chota Nagpur Tenancy Act cannot be stayed—But High Court can stay under powers ancillary to appeal—Chota Nagpur Tenancy Act (6 of 1908), Ss. 215 (3), 224 and 229.

The provisions of the Civil Procedure Code as to stay of proceedings do not apply to cases under the Chota Nagpur Tenancy Act, but as that Act gives a right of appeal to the High Court, the Court has inherent jurisdiction as a Court of appeal where an appeal lies to it, to stay proceedings as ancillary to its powers as the appellate authority to reverse an order of an inferior Court. The jurisdiction however should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise.

[P 344 C 1, 2]

Atul Krishna Roy—for Appellant.

P. R. Das and Sailendranath Palit—for Respondent.

Dawson-Miller, C. J.—This is an application asking for a stay of execution on behalf of the appellant in an appeal brought under S. 215 (3) and S. 224, Chota Nagpur Tenancy Act. The appeal is from a decision of the Deputy Collector, acting with the powers of a Deputy Commissioner, the amount in dispute being over Rs. 5,000, and objection is taken that this Court has no jurisdiction under the provisions of the Code of Civil Procedure to exercise its powers of stay. Now it must be conceded that the Civil Procedure Code does not apply to cases except cases tried by the Civil Courts save in so far as there is any express provision in the Civil Procedure Code itself, and the question which we have to determine is whether under the Chota Nagpur Tenancy Act, this Court is granted those powers of staying proceedings mentioned in O. 41, R. 5, Civil P. C. S. 229, Chota Nagpur Tenancy Act, provides that the provisions of S. 561, Civil P. C., (now O. 41, R. 22) which applies to cross-objections shall, so far as applicable, apply to all appeals under this Act from decisions of the Deputy Commissioner, and Ss. 215 to 229 deal with appeals in suits under the Act itself.

Section 224 provides that certain appeals shall lie from the Deputy Commissioner or the Deputy Collector, where the amount in dispute exceeds Rs. 5,000, to the High Court, but no provision is made in the

Act applying O. 41, R. 5, Civil P. C., to cases under the Chota Nagpur Tenancy Act. Certain provisions of the Civil Procedure Code are applied to the trial of cases under that Act, and the Local Government has power to make rules and prescribes the procedure to be followed. That appears from S. 264 which provides that the Local Government may make rules to carry out the objects of this Act, and, in particular and without prejudice to the generality of sub-S. (1), the Local Government may make rules in a great number of cases amongst others to prescribe the procedure to be followed and the information to be given by any party or applicant in any proceeding under this Act; and S. 265 provides, in sub-S. (1), that the Local Government may, with the previous sanction of the Government of India, make rules for regulating the procedure of the Deputy Commissioner in matters under this Act for which a procedure is not provided hereby; and may, by any such rule, direct that any provisions of the Code of Civil Procedure shall apply with or without modification to all or any classes of cases before the Deputy Commissioner; and sub-S. (3) which is important provides that, until rules are made under sub-S. (1), which I have just referred to, and subject to those rules when made and to the other provisions of the Act, the provisions of the Code of Civil Procedure relating to certain matters which are described under headings (a) to (k) shall, so far as may be, and, in so far as they are not inconsistent with this Act, apply to all suits, appeals and proceedings before the Deputy Commissioner under this Act and to all appeals from decisions passed in such suits or proceedings.

Now the Local Government, in fact, has made no provision for making rules for regulating the procedure and therefore under sub-S. (3), S. 265, the only rules which apply are those mentioned in that subsection, and those rules which are enumerated, as I said, under the headings (a) to (k) do not include the powers of the Court to stay proceedings. Therefore it appears to me that as the Civil Procedure Code does not in itself apply to cases of this sort, and as the Chota Nagpur Tenancy Act which alone gives a right of appeal to the High Court, although it prescribes the procedure to be followed, does not incorporate in that procedure

the provisions of O. 41, R. 5, Civil P. C., that the right of the High Court to stay proceedings in cases of this nature cannot be exercised under the Civil Procedure Code. The matter however is not of very great importance in this case, because it seems to me quite clear that the Court has inherent jurisdiction as a Court of appeal where an appeal lies to the High Court, to stay proceedings in the lower Court as ancillary to its powers as the appellate authority to reverse an order of the inferior Court. That doctrine was laid down in *Panchanan Singha Roy v. Dwarka Nath Roy* (1) and again in *Balkishen Sahu v. Khugnu* (2). At the same time I think that this right of staying execution in cases under appeal should be exercised sparingly and only in cases where it is manifest that justice demands such an exercise. We are prepared therefore to hear applicant in this case and to consider whether there is any real ground upon which he is justified in asking us for a stay of execution.

Coutts, J.—I agree.

V.S./R.K.

Order accordingly.

(1) [1906] 3 C. L. J. 29.

(2) [1904] 31 Cal. 722.

A. I. R. 1919 Patna 344

DAS, J.

Mukhi Singh and others—Plaintiffs—Appellants.

v.

Kishun Singh and others—Defendants—Respondents.

Second Appeal No. 1096 of 1917, Decided on 15th May 1919, from decision of Dist. Judge, Patna.

Evidence Act (1 of 1872), S. 92—Oral evidence to contradict not terms but recitals in deed is admissible.

There is nothing in S. 92, to exclude evidence of an oral agreement which contradicts, varies, adds to, or subtracts from, not the terms of the contract, but some recitals in the contract itself.

[P 345 C 1]

Panchanan Banerji—for Appellants.
Fakhruddin and Sevashwardayal—for Respondents.

Judgment.—Only two questions have been argued before me: first, that the lower appellate Court erred in coming to the conclusion that evidence of the existence of a separate oral agreement could be given in this case; and secondly, that the lower appellate Court erred in coming to the conclusion that the case was a case of breach of trust and therefore

there was no limitation. It appears to me that so far as the first question is concerned, the lower appellate Court came to a right conclusion. The plaintiff's case was that at the time of the mortgage he left the consideration money with the mortgagee in order that certain prior mortgage debts may be paid off. His complaint is that those prior mortgage debts were not paid off and therefore he was obliged to bring this suit for recovery of the money which remained in the hands of the mortgagee. The learned vakil for the appellants points out that the mortgage deed contains a clear recital that the mortgagor received the full consideration money and paid off the debt due to the prior mortgagees, and he argues that there being a clear recital to that effect, the contemporaneous oral agreement to the effect that the money remained with the mortgagee for the purpose of being applied to the payment of prior mortgage debts is not admissible under S. 92, Evidence Act. The learned Government Pleader in his able argument points out that the word deliberately used by the legislature in S. 92 is "terms" and not "recitals," and S. 92 excludes all evidence of oral agreements in so far as it contradicts, varies, adds to or subtracts from the terms of any contract, grant or other disposition of property. It will be noticed therefore that there is nothing in S. 92, Evidence Act, which excludes evidence of an oral agreement which contradicts, varies, adds to, or subtracts from, not the terms of the contract, but some recitals in the contract itself.

I am of opinion that the argument of the learned Government Pleader is manifestly sound and must prevail. If any authority is needed for the proposition it will be found in the case of *Shah Lal Chand v. Indarjit* (1). I therefore come to the conclusion that the lower appellate Court came to a right conclusion on this point and that therefore the Court of first instance must come to a definite conclusion on the question raised by the plaintiff in his pleading. The next point urged is that there is no necessity to remand the case to the Court of first instance inasmuch as the plaintiff's suit is clearly barred by limitation. The learned vakil points out that the lower appel-

late Court is clearly wrong in coming to the conclusion that the case is a case of breach of trust and that therefore there is no question of limitation. I agree with him that no case has been made out under S. 10, Lim. Act, but I do not agree with the learned vakil that the suit is necessarily barred by limitation. I do not desire to express a definite opinion on this point, inasmuch as I do not think that I should fetter the judgment of the Court of first instance on this point. I hold however that the opinion of the lower appellate Court that the case comes within S. 10, Lim. Act, and that therefore there is no limitation at all is, in my opinion, not correct. In my opinion either Art. 62 or Art. 115 would possibly apply to the facts of the case; and if Art. 62 applies, then it would be for the Court of first instance to consider the starting point of limitation. The article itself says

"that the period begins to run from the time when the money is received."

Clearly it must mean when the money is received for the plaintiff's use, that is to say the period would begin to run from the time

"when the mortgagee refused to pay to the prior mortgagees but held the money constructively for the use of the plaintiff."

If authority is needed for this proposition, it will be found in the case of *Johuri Mahton v. Thakoor Nath Lukee* (2). I however do not express any opinion on the question whether Art. 62 applies or whether Art. 115 applies, or whether the suit is, in fact, barred by limitation. All that I say is that there is no case made out of breach of trust in this matter. The appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(2) [1880] 5 Cal. 830.

* A. I. R. 1919 Patna 345

DAWSON-MILLER, C. J. AND FOSTER, J.
Bibi Sairah—Plaintiff—Appellant.

v.

Mt. Golab Kuar and others—Defendants—Respondents.

Second Appeal No. 401 of 1918, Decided on 29th July 1919 from a decision of Offg. Dist. Judge, Muzafferpur, D/- 24th September 1917.

(a) Limitation Act (9 of 1908), S. 14—Time spent in prosecution of suit in Court which could not have jurisdiction if suit had been properly valued cannot be exempted.

Where a suit is undervalued and as a consequence of the undervaluation is instituted in a

(1) [1900] 22 All. 370=27 I. A. 93=7 Sar. 702 (P. C.).

Court which would not have had jurisdiction to entertain it had it been correctly valued, the time spent in prosecuting the suit in such a Court cannot, under S. 14, be allowed in computing the period of limitation applicable to the suit.

[P 348 C 1, 2; P 349 C 1]

(b) Civil P. C. (5 of 1908), S. 24—Order of transfer cannot be made unless suit is in Court having jurisdiction.

An order for the transfer of a suit from one Court to another under S. 24, cannot be made unless the suit has been brought in a Court having jurisdiction. [P 348 C 1, 2]

(c) Civil P. C. (5 of 1908), O. 21, R. 63—Plaintiff has to prove not only execution of document relied on and its consideration but also its genuineness—It must be definitely proved that it is not merely colourable transaction.

A suit under O. 21, R. 63, in which a transferee from the judgment-debtor seeks to establish his title to the property transferred, is in effect to set aside an order passed under R. 58 of the Order and therefore the onus lies upon the person relying upon the deed of transfer not merely to prove that it was properly executed and that consideration passed but that the document is really what it purports to be and is not merely a colourable transaction. [P 349 C 2]

The burden is not discharged by merely pointing to the innocent appearance of the instrument under which the plaintiff claims; he must show that the instrument is as good as it looks. The defendant is not bound to show that the transaction is colourable. [P 350 C 1]

Fakhruddin and P. Banerjee—for Appellant.

Rai Garu Saran Prasad—for Respondents.

Dawson-Miller, C. J.—This is an appeal by the plaintiff Bibi Sairah against a decision of the Offg. District Judge of Muzafferpur, dated 24th September 1917, in which, overruling the decision of the Subordinate Judge, he dismissed the plaintiff's suit for a declaration. The plaintiff brought the present suit under the provisions of O. 21, R. 63, Civil P. C., claiming a declaration from the Court that she was the owner in possession of certain property specified in the plaint, and that it never belonged to the defendant 2nd party, and the defendants 1st party had no right at all to attach and sell the property in execution of a decree which they had obtained against the defendant 2nd party. Two questions, and two questions only, have been raised in this appeal, one relating to the validity of the transfer of the property in suit made by the plaintiff's husband, who is the defendant 2nd party, at a time when the defendants 1st party had obtained a decree against her husband. In order to understand how the questions

for consideration arose, it is necessary to state shortly what the facts are. In February 1908 the defendants 1st party, whom it will be convenient to refer to as the decree-holders, obtained a decree against the defendant 2nd party, who is the husband, as I have already stated, of the plaintiff for a sum of, in round figures, Rs. 38,000.

In the year 1909 execution proceedings under that decree were instituted by the decree-holders. These were opposed by the judgment-debtor, the defendant 2nd party, who petitioned to set aside the decree and the execution was stayed pending the hearing of his petition, but, on 28th September 1910, his objection was disallowed. It appears from the record that the decree was partly executed against the judgment-debtor, the defendant 2nd party, and, sometime in the year 1912, further execution proceedings were taken out by the decree-holders and certain properties, which are the subject of the present appeal, were attached and advertised for sale. Previously to that, on 24th November 1910, the judgment-debtor transferred to the plaintiff under a baimokasa deed the property in suit which, at that time, belonged to him and the consideration for the transfer was stated to be the release by the transferee of her husband's obligation to her to pay deferred dower to the extent of the value of the property, which valued at Rupees 5,000. On 19th April 1913 the plaintiff filed objections to the execution proceeding, under O. 21, R. 58, Civil P. C., claiming that the property which had been attached had been transferred to her and was in her possession and was not subject to attachment by the defendants 1st party in their suit against her husband. This objection was rejected by the Subordinate Judge, on the ground that the transfer was fabricated in order to defraud the creditors of the judgment-debtor. Thereupon, on 10th June 1913, rather less than two months later, the plaintiff instituted the present suit in the Munsif's Court at Muzafferpur. In that suit she valued the property, for purposes of jurisdiction, at a sum of Rs. 1,500, and not at a sum of Rs. 5,000, which was the value put upon it in the baimokasa deed under which she claimed to have acquired the property. The Munsif at Muzafferpur, at that date had jurisdiction to try suits up to the value of Rs. 2,000 and

therefore if the valuation of the suit was properly given in the plaint there can be no doubt that the suit was properly instituted in the Munsif's Court. But shortly after the institution of the suit, it appears that the Munsif was transferred and there was no other Munsif at Muzafferpur who had jurisdiction to try a suit of a value of over Rs. 1,000. Accordingly, the case was transferred from the Munsif's Court to that of the Subordinate Judge, by order of the District Judge, on the ground that the Munsif's successor had no jurisdiction to try suits of a value over Rs. 1,000. That order of the District Judge was made in compliance with the provisions of S. 24, Civil P. C.

After the case had been transferred to the Court of the Subordinate Judge, a question arose between the plaintiff and the defendants 1st party as to the real value of the property. It appears from the order passed on that occasion, dated 2nd July 1914, by the Subordinate Judge that the dispute between the parties was really relative to a question of court-fees, the plaintiff contending that the value of the property was Rs. 1,500 and the defendants contending, apparently, that it was of the value stated in the baimokasa deed, viz. Rs. 5,000. The view that the Subordinate Judge took so far as the Court fees stamp was concerned, was that in any case, whether it was Rs. 1,500, or Rs. 5,000, the stamp was sufficient and he made this order:

"In this case the plaint was stamped with a court-fee stamp of Rs. 10 only in value. The case reported as *Phul Kumari v. Ghanshyam Misra* (1) supports this view. I therefore hold that the plaint has been properly valued."

It appears to me reading this order and referring to the case of *Phul Kumari v. Ghanshyam Misra* (1), that the only question which the Subordinate Judge was concerning himself with was whether the proper court-fee had been paid, and when he states, "I therefore hold that the plaint has been properly valued," I cannot help feeling that what he intended to say was that so far as the court fee was concerned, it did not matter whether the valuation was Rs. 1,500 or Rs. 5,000. However that might be it appears that upon the same day the plaintiff herself applied to amend the plaint by altering the value from Rs. 1,500, as originally

stated to Rs. 5,000 and the plaint was amended accordingly. That was on 2nd July 1914. After the plaint had been amended, the Subordinate Judge, on 8th July 1914, returned it to the plaintiff for refileing it in the proper Court, he being of opinion that a suit valued at Rs. 5,000 could not have been filed in the Court of the Munsif and therefore it ought to be refiled in the Court of the Subordinate Judge so as to grant jurisdiction. The reason given by the Subordinate Judge was that the Court in which the plaint was originally filed had no jurisdiction to try the case. The defendant 2nd party, the husband of the plaintiff, as might be expected, put in no written statement to the suit, but the decree-holders contended, by their written statement, first of all that the suit was barred by limitation and secondly that the transfer to the plaintiff by her husband of the property in suit was not a bona fide and valid transaction, but merely colourable, and that in any event the baimokasa deed was executed by the husband in order to defeat and delay his creditors within the provisions of S. 53, T. P. Act.

When the case came for trial before the Subordinate Judge, the issues framed were as follows: (1) Whether the deed of baimokasa is a bona fide and valid transaction. Whether it was executed in order to defeat and defraud creditors as stated by the defendants. (2) Is the suit barred by limitation? It will be observed that issue 1 is really divided into two separate questions. The first part goes to the validity of the transaction. The second goes to the question whether or not it is voidable at the option of the creditors who have been defeated or delayed thereby, and the case appears to have been fought and tried and determined on those lines. The Subordinate Judge decided both the first and the second issues in favour of the plaintiff and granted her a decree. The District Judge, on appeal, differed with him on both points. He came to the conclusion that the suit was barred by limitation, that the document of transfer relied upon by the plaintiff was not a bona fide document, and that the plaintiff was never really in possession of the property. He also came to the conclusion on the evidence that, in any event, the transfer was meant to keep the defendants and the other creditors at a safe distance and to defeat and delay them.

(1) [1908] 35 Cal. 202=35 I. A. 22 (P. C.).

From this decision the plaintiff has appealed to this Court.

She contends that the learned District Judge was wrong on both points which he decided against her. It will be convenient to deal with the question of limitation first. The period in which a suit under O. 21, R. 63, Civil P. C., may be instituted is one year from the time when the objection in execution is decided against the plaintiff, and if the suit was properly instituted in the first instance, that is to say on the 10th June 1913, when the plaint was filed in the Court of the Munsif at Muzaffarpur, then it was clearly within time. If however the suit was instituted before a Court which had no jurisdiction to try it, then the time of institution must be taken as 8th July 1914, which is clearly more than a year after the date when the objection in execution under O. 21, R. 58, Civil P. C., was decided against the plaintiff. The question therefore is whether the learned District Judge was right in coming to the conclusion, as he did, that the suit was instituted in a Court which had no jurisdiction to try it. It is not disputed now that the value of the subject-matter of the suit was Rs. 5,000, and it is not disputed that the plaintiff cannot, by undervaluing the suit proceed in a Court which has not jurisdiction to try such suit if valued at the proper amount, and if, in fact, it should turn out, as it has now been admitted, that the value was Rs. 5,000 and not Rs. 1,500, the plaintiff cannot by valuing it at Rs. 1,500 be heard to say that the suit was properly instituted in the first instance. It is contended however that by reason of the transfer made by the District Judge when the Munsif before whom the suit was originally instituted was transferred, any defect there might be in the initial want of jurisdiction in the Court before which the suit was instituted was cured, and that the case having once got before the Subordinate Judge, it was of no moment whether the value was Rs. 1,500 or Rs. 5,000 because the Subordinate Judge had jurisdiction to try a suit of either value. It has been decided by their Lordships of the Privy Council in the case of *Ledgard v. Bull* (2) that an order for the transfer of a suit from one Court to another under S. 25, Civil P. C., can-

not be made unless the suit has been brought in a Court having jurisdiction. That was under S. 25 of the old Code, which is now equivalent to S. 24 of the present Code. In that case, it is true, the Court in which the suit was instituted had no jurisdiction whatever over the subject-matter, and we have been asked to distinguish that case from the present on the ground that, in the present instance, there is jurisdiction in the Munsif's Court over the subject-matter of the suit upto, at all events, the value of Rs. 1,500. I cannot accept this argument, because I can see no difference in principle between a case where a Court has no jurisdiction over the subject-matter and a case where a Court has no jurisdiction over subject-matter valued at over a certain amount. The subject-matter of the suit in this case is property worth Rs. 5,000. The Court of the Munsif had no jurisdiction whatever to try the case and it seems to me, once a limit is placed upon the pecuniary valuation of the property which may be the subject of a suit in a certain Court, that you cannot say that the Court has any jurisdiction in regard to property of a value over and above that limit.

If that is so, it would appear to follow from the decision of their Lordships in the case of *Ledgard v. Bull* (2) that the District Judge had no jurisdiction to transfer the case under S. 24, Civil P. C., so as to confer jurisdiction upon the Munsif's successor or substitute, in this case substitute, because his successor had not jurisdiction to try a case of over Rs. 1,000. The next point which was mentioned but not really pressed was that the plaintiff should be allowed under S. 14, Lim. Act, to deduct the time which was occupied in prosecuting the suit instituted in the Munsif's Court from the period of limitation. The short answer to this is, that the District Judge has found, as a fact, that the plaintiff was not acting in good faith in valuing the property at Rs. 1,500 and in instituting her suit and prosecuting it in the Munsif's Court, and in support of his finding, he relied upon S. 2, Cl. 7, Lim. Act, which provides that nothing shall be deemed to be done in good faith which is not done with due care and caution. As he was satisfied that due care and caution had not been exercised on the part of the plaintiff in

(2) [1887] 9 All. 191=13 I. A. 134=4 Sar. 741 (P. C.).

this case, but, rather, that she deliberately valued her suit at Rs. 1,500 in order to bring it before the Munsif as the Subordinate Judge had already dismissed her objection under O. 21, R. 58, he thought that there were no merits to enable him to come to the conclusion that she had been acting in good faith. He found as a fact that it was not a bona fide mistake and that S. 14, Lim. Act. had no application to the circumstances of the case. In these circumstances I have come to the conclusion that the learned District Judge was right in holding that the suit was barred by limitation, and that is sufficient to dispose of this case.

The other question however was argued before us at some length, and I think it is desirable to state shortly the conclusions at which I have arrived on that question. It was contended, in the first instance, that the learned District Judge, in arriving at his conclusions of fact, had not taken into consideration certain features of the evidence which had been dealt with by the Subordinate Judge. The principal feature, and practically the only feature, which it is claimed the District Judge did not deal with specifically in his judgment was the fact which was referred to in the judgment of the Subordinate Judge, that the defendant 2nd party, the judgment-debtor in this case, had paid off a decree held by another party for Rs. 15,000, and had also paid off a sum of Rs. 20,000 due under the decree of the defendants 1st party, the decree-holders, and it was in evidence that he was still in possession of property which yielded an income of Rs. 6,000 and therefore it could not be argued that he had no means to repay the defendants 1st party. It is quite true that the District Judge does not appear to refer specifically to this portion of the evidence relied upon by the Judge of the trial Court, but it cannot be supposed that the reasons which actuated the Subordinate Judge were not present to the mind of the District Judge at the time he gave his judgment, nor is it, in my opinion, necessary that he should deal in detail with the whole of the reasons which induced the Subordinate Judge to arrive at the conclusions of fact at which he did. The learned District Judge goes through the main features of the case very carefully, weighs

them, and for reasons which cannot now be impugned, he comes to the conclusion that the document in question relied upon by the plaintiff was not a bona fide document and, further, that there was no evidence to satisfy him that the plaintiff ever was in possession of the property at all; in other words, that her husband remained in possession of the property and that the so-called deed of baimokasa had not been intended to be acted upon at all. He further came to the conclusion that the object of this transaction was to defeat and delay the creditors.

The second argument adduced on behalf of the appellant on this part of the case was, that the learned Judge had wrongly placed the onus upon the appellant of proving, not only the actual fact of transfer and consideration paid, but the further fact that the deed in question was really what it purported to be, that is to say a bona fide transaction meant to pass the property. It was contended that, once the transaction had been proved and the fact that the transfer was for good consideration, the onus lay upon the persons impugning that deed to prove that it was not a bona fide transaction, and for this contention the case of *Suba Bibi v. Balgobind Das* (3) was relied upon. The facts of that case were certainly somewhat similar to the present and the onus there, of proving that the document relied upon was not a bona fide valid transaction, was placed upon the defendant in the suit. But although in ordinary cases I think it may be accepted that when once a transfer is proved and the passing of consideration shown the onus then lies upon the person impugning the document to prove that it is not a valid and bona fide transaction, still, in the present case the suit is one brought under O. 21, R. 63, Civil P. C., which is in effect, as pointed out in the case of *Jamahar Kumari Bibi v. Askaran Boid* (4), a suit to set aside an order passed under O. 21, R. 58, and therefore the onus lies upon the person relying upon the deed of transfer not merely to prove that it was properly executed, and that consideration passed, but that the document is really what it purports to be and is not merely a colourable transaction. This question was not specifically dealt with by the learned Judges who decided

(3) [1886] 8 All. 178.

(4) [1915] 30 I. C. 885.

the case of *Suba Bibi v. Balgobind Das* (3) and the incidents attaching to a suit under O. 21, R. 63, in so far as they affect the burden of proof, do not appear to have been considered in that judgment. But in the case I have just referred to, of *Jamahar Kumari Bibi v. Askaran Boid* (4), this very question was raised, and discussed and determined.

A Full Bench of the Calcutta High Court, consisting of Sir Lawrence Jenkins, C. J., Woodroffe and Mookerjee, JJ., three distinguished Judges of that Court, having considered this question as to the onus of proof in a suit, such as the present suit, brought under O. 21, R. 63, came to the conclusion that in a suit to set aside an order made adversely to the plaintiff on a claim to property preferred by her in execution proceedings, on the ground that the property belongs to her in her own right and not as a benamidar for the judgment-debtor, the onus is on her to show affirmatively that not only the ostensible but the real title also is in her. The burden cast on her is not discharged by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look. The defendant is not to make out that they are colourable. That is a decision of three Judges of the Calcutta High Court in which this very question was discussed and determined, and I see no reason for differing from the conclusions therein arrived at. Accepting the ruling laid down there as I do, it seems to me that the learned District Judge was perfectly right in holding, as he did, that the onus lay upon the plaintiff to prove not merely the execution of the document and the passing of consideration, but also the further fact that the document was, to use the language of Sir Lawrence Jenkins, "as good as it looked."

The next point which was raised by the appellant was that in a suit of this nature it was not competent to the defendant to set up as a weapon of defence S. 53, T. P. Act, and that until they had taken proper proceedings in a Court of competent jurisdiction to set aside the transfer, they could not in a suit of this nature contend that the transfer was voidable and so defeat the plaintiff's claim and for that proposition certain decisions of the Madras High Court were relied upon. It is not necessary to refer to

them all, but the principal decision which was relied upon was that of *Palaniandi Chetti v. Appavu Chettiar* (5). The first part of the head-note which was relied upon by the appellant is this:

"In a declaratory suit under O. 21, R. 63, Civil P. C., by a vendee from the judgment-debtor, the decree-holder cannot plead in defence that the sale was in fraud of creditors and could not prevail over his decree. If the sale was prior to the attachment the decree-holder must first set aside the sale by a separate suit."

But it must be pointed out that the judgment proceeds upon the assumption that the transaction in question was a real one and that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say that it was not merely a colourable transaction. In the present case it has been found upon the issues raised that the transfer was not a bona fide transfer at all, that the plaintiff in the suit never had possession of the property and that it was not therefore a valid transaction, and therefore the decision arrived at in the case just mentioned does not appear to me to have any application to the facts of the present case.

The result of the findings is that the baimokasa deed in this case is not merely voidable at the option of the creditors, but it is in fact void and only colourable and was never meant to be acted upon, and the mere fact that the transaction was one which was carried out with intent to defeat, or delay or defraud creditors does not in itself bring it within the operation of S. 53, T. P. Act, which contemplates a transfer binding between the parties but voidable only at the option of the persons specified in the section. For these reasons I have come to the conclusion that this appeal must fail upon both points raised by the appellant and must be dismissed with costs.

Foster, J.—I agree.

V.S./R.K.

Appeal dismissed.

(5) [1916] 34 I. C. 778.

*** * A. I. R. 1919 Patna 350
Full Bench**

ATKINSON, JWALA PRASAD AND
DAS, JJ.

Lalji Tewari and another—Petitioners.

v.

Emperor—Opposite Party.

Civil Criminal Revn. Nos. 5 and 6 of 1919, Decided on 20th June 1919, against orders of Small Cause Court Judge., Chapra, D/- 31st January 1919.

* * Criminal P. C (5 of 1898), S. 195—(Per Full Bench), S. 195 (7) (c) applies to Small Cause Court—Order granting or refusing sanction to prosecute passed by Small Cause Court—Court proper to review is District Court. (*Jwala Prasad, J., dissenting*).

Held: by a majority of the Court (*Jwala Prasad, J., dissenting*), that Cl. (c), sub-S. 7, S. 195, applies to a Small Cause Court, and that the authority to review an order made by the latter Court granting or refusing sanction to prosecute is the District Court within whose local limits the Small Cause Court is situate.

[P 353 C 2; P 356 C 1]

Jwala Prasad, J.—Neither sub-S. 7, S. 195, nor any of its Cls. (a), (b) or (c) applies to Courts of Small Causes. Under sub-S. 6 of that section an application can be made both to the District Court and to the High Court for the purpose of revoking or granting a sanction given or refused by a Court of Small Causes. As a matter of procedure however such applications should not, except under special circumstances, be entertained by the High Court: *The scope of S. 195, Examined and discussed.*

[P 359 C 2; P 361 C 1]

Yunus and Ram Prasad—for Petitioners.

Sultan Ahmad and Monohar Lall—for the Crown.

Atkinson, J.—This application in revision comes before this specially constituted Bench on a reference made by my learned brother *Jwala Prasad, J.*, and myself with the consent of the Chief Justice.

The question which arises for decision in this application is to what Court, if any can an application, with respect to a sanction given or refused by a Court of Small Causes under S. 195, Criminal P. C., be made for its revocation or grant as the case may be? Before dealing specifically with the point requiring determination, it is desirable briefly to examine the scope of S. 195, Criminal P. C., and the procedure laid down with reference to the rights created thereby. S. 195, Criminal P. C., confers upon certain authorities the right of granting sanction to prosecute certain individuals for offences against the specific sections of the Penal Code mentioned therein. The power conferred to grant or refuse sanction rests (a) with certain public servants, and (b) with Courts before whom offences against public justice may have been committed.

By sub-S. (2), S. 195, Criminal P. C. the term "Court" is defined, and "Court" is therein declared to mean a civil, Revenue or criminal Court, but does not include a Registrar or a Sub-Registrar under the Registration Act of 1877.

Therefore, I take it, the term "Court" applies without restriction to the general classification of all civil Courts, all Revenue Courts and all criminal Courts. Sub-S. (6), S. 195 provides that any sanction given or refused may be revoked or granted by any authority to which the authority granting or refusing it is subordinate. Sub-S. (6) however does not apparently give an express and unqualified right of appeal to the persons or parties against whom sanction has been given or refused respectively. It is merely an enabling section authorizing a superior authority to review an order of sanction granted or refused by a subordinate authority.

The word "authority", as used in S. (6), applies to public servants within the meaning of Cls. (a), Sub-S. (1) and to Courts within the meaning of Cl. (b) and (c), sub-S. (1). When however the authority granting or refusing sanction to prosecute is a Court, then the provisions of sub-S. (6) apply and regulate the procedure to be adopted with reference to the authority to be vested with power to review a sanction antecedently given or refused. Sub-S. (7) runs as follows:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie."

Then by way of explanation of the meaning and purport of sub-S. (7) are added three Clauses, (a), (b) and (c) for the purpose of defining when one Court is or may be deemed to be subordinate to another, with a view of ascertaining the Court which has power to review a sanction to prosecute granted or refused by a Court subordinate to it. S. 195, Criminal P. C., is self-contained and provides its own procedure, and from within the four corners of the section itself we must ascertain its true meaning and intent.

Sanction to prosecute the petitioners *Lalji Tiwari* and *Dipak Tiwari* was granted by the Judge of the Small Cause Court of Chapra on 31st January 1919 under Ss. 209, 210, 467 and 471, I. P. C., read with S. 195, Criminal P. C. From the sanction so granted application was made by the petitioners respectively by separate applications to the High Court to revoke the sanction so granted by the Judge of the Small Cause Court of Chapra. It was contended before us that in such cases the High Court is the authority within the meaning of sub-S. (7),

S. 195, to review a sanction granted or refused by a Small Cause Court Judge, inasmuch as the Court of Small Causes is immediately subordinate to the High Court, as appeals from a Court of Small Causes lie directly to the High Court by virtue of the provisions of S. 25, Provincial Small Cause Courts Act of 1887. Mr. Yunus argues that the right to review a sanction given or refused by a Small Cause Court is only entertainable by the High Court, and he relies upon sub-S. (7), S. 195. The argument of Mr. Yunus is based entirely on the right of revision and superintendence exercisable by the High Court over a Court of Small Causes under S. 25, Small Cause Courts Act, and he contends that S. 25 confers in a modified form a right of appeal even though applications presented under S. 25 to the High Court may be revisional; and he cites in support of this contention a case reported as *Sheo Nandan Prasad v. Emperor* (1), in which it was laid down that an application in revision is an appeal in a modified form. However we feel unable to assent to the first branch of the argument addressed to us by Mr. Yunus.

Sub-S. (7), S. 195 refers to cases in which an unqualified and absolute right of appeal is given from the decision by one Court to another at the instance of a party to the litigation before it. S. 25, Provincial Small Cause Courts Act does not confer an absolute and unqualified right of appeal. It merely enables the High Court in the exercise of its discretion and power of superintendence to revise the proceedings of the Small Cause Court with a view of seeing that justice is done and that the law is properly applied and administered. In no sense therefore can it be said that the High Court is the Court to which appeals from Small Cause Courts ordinarily lie, in the sense contemplated by sub-S. (7), S. 195.

Alternatively Mr. Yunus suggests that if his first argument fails that then there is no Court in existence capable of reviewing a sanction to prosecute given or refused by a Small Cause Court; and in support of this contention he relies upon what he conceives to be the true construction of Cl. (c), sub-S. (7), which he argues has no application to a Small

Cause Court and reliance is placed in support of this proposition upon the rulings reported as *Ajudhya Prasad v. Ram Lal* (2), *Ambica Tewary v. Emperor* (3) and *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4).

Mr. Yunus admits that Cls. (a) and (b), sub-S. (7), S. 195, Criminal P. C., cannot apply to a Small Cause Court, inasmuch as there is no Court (if his first argument fails) to which an appeal ordinarily lies from a proceeding in a Small Cause Court; and thus it is conceded that the only clause of sub-S. (7) which can apply with reference to the question now requiring determination by this Court is Cl. (c); and in support of this contention reliance is strongly placed on the reported decisions of this Court which were decided by our late and distinguished Sir Edward Chamier, C. J., that Cl. (c) does not apply to a Small Cause Court and that therefore a Small Cause Court is a Court whose orders as to granting and refusing sanction to prosecute are immune and incapable of review by any superior authority whatsoever. Cl. (c) runs as follows:

"Where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate."

Two contentions are put forward as to what is the construction of this clause: The first is that the principal Court of original jurisdiction in any district or area defined by the Local Government under its powers is the District Court; but that inasmuch as the District Court has no original jurisdiction in Small Cause Court suits that therefore no right of review can rest with it in respect of sanctions granted or refused by a Small Cause Court. The second contention advanced is that on the authority of the decisions cited, Cls. (a), (b) and (c), sub-S. 7, S. 195, Criminal P. C., deal not with Courts granting or refusing sanction to prosecute, but to cases in which sanction to prosecute has been granted or refused, and that consequently Cl. (c) applies to a proceeding of a non-appealable character in an original suit in which an appeal lay. This argument was assented to by a Division Bench of the Allahabad High Court reported as

(2) [1912] 34 All. 197=13 I. C. 284

(3) [1916] 1 Pat. L. J. 206=34 I. C. 320.

(4) [1917] 2 Pat. L. J. 1=38 I. C. 754.

(1) [1918] 3 Pat. L. J. 581=46 I. C. 977.

Ajdhya Prasad v. Ram Lal (2) and as a logical extension of the ratio decidendi of that decision, Chamier, C. J., held in this Court in a case reported as *Ambica Tewary v. Emperor* (3) that a Small Cause Court was not directly or indirectly within the purview of Cl. (c), sub-S. (7), S. 195, Criminal P. C.

Roe, J., following the decision of Sir Edward Chamier in this Court, likewise yielded to a similar contention, and held that the District Court was not the Court of original jurisdiction with reference to Small Cause Court matters and suits, and that the District Court could not therefore be said to be the authority contemplated by Cl. (c) for reviewing sanctions granted or refused by a Small Cause Court situated within its territorial limits. Roe, J., further held that on the true construction of Cl. (c), sub-S. (7), the only Court of original jurisdiction in existence in respect of Small Cause Court matters was the Small Cause Court itself and that therefore the Small Cause Court was the only authority capable of reviewing its own decisions granting or refusing sanction to prosecute. This decision was criticised in the Full Bench ruling reported as *Chidda Lal v. Bhajan Lal* (5), and, as was pointed out, such a construction of Cl. (c), sub-S. 7, would lead to hopeless anomaly and render the interpretation of sub-S. 7, S. 195, an obvious absurdity, a result which we must presume the legislature never intended according to the established rule for the construction of statutes.

The fundamental error underlying the decision of the Division Bench of the Allahabad High Court reported as *Ajdhya Prasad v. Ram Lal* (2) appears to us to be in construing sub-S. 7, S. 195, and the explanatory clauses annexed thereto as dealing only with cases in which appeals lie to certain Courts. It appears to us for the purpose of construing sub-S. 7, 195, to be immaterial whether an appeal lies in certain cases or not; but the vital consideration is whether an appeal ordinarily lies from one Court to another superior to it, and to which the first Court is as a general rule subordinate. If this then be the true construction of sub-S. (7) as we believe it is, then Cl. (c), sub-S. (7), cannot have the restricted and limited interpretation put

upon it by the Division Bench of the Allahabad High Court in the ruling already referred to.

Sub-S. 7 purports to define when a Court is subordinate to another; and in order to make the meaning of the legislature clear illustrations are appended to that subsection in sub-Cls. (a), (b) and (c) for the purpose of showing when one Court is or is deemed to be subordinate to another. The illustrations contained in Cls. (a) and (b) are free of difficulty; and Cl. (c), we think, was intended to apply where no appeal at all lay from the Court exercising the functions and powers conferred by S. 195, Criminal P. C. A Small Cause Court is such a Court, because no appeal lies from it save and except by way of revision under S. 25, Provincial Small Cause Courts Act, and to a limited extent in certain respects under S. 24, Small Cause Courts Act to the District Judge.

The majority of us are of opinion that Cl. (c), sub-S. 7, S. 195, Criminal P. C., applies only to Courts from which no appeal lies, whether the Court be a civil Court, a criminal Court or a Revenue Court.

The Government Advocate however submits a very clear argument in answer to the case put forward on behalf of the petitioners by Mr. Yunus. Shortly summarized, the Government Advocate's contention is that in cases of Small Cause Courts a review of a grant or refusal to sanction to prosecute is only entertainable by the District Judge's Court, and not by the High Court. This argument on behalf of the Government Advocate is subdivided into two branches:

It appears that in this province only one Small Cause Court was created under the provisions of the Small Cause Courts Act of 1887 and that that Court is the Small Cause Court situate at Dinapur. In every other district a Subordinate Judge or Munsif is vested with the powers of a Small Cause Court Judge under S. 25, Civil Courts Act of 1887; and thus the Government Advocate contends that the Subordinate Judge or Munsif, as the case may be, vested with the powers of the Small Cause Court Judge is still, while acting as a Small Cause Court Judge, nevertheless a Munsif or a Subordinate Judge, as the case may be, and that in testing the right of the authority to review a sanction given or

(5) [1917] 39 All. 657=42 I. C. 167 (F.B.).

refused by a Subordinate Judge or a Munsif while so acting as a Small Cause Court Judge the authority to review such sanction is with the tribunal to whom an appeal ordinarily would lie from a Subordinate Judge or a Munsif as such; and that, therefore the provisions of Cl. (a), sub-S. 7, come into play and the authority to review such sanction given by a Subordinate Judge or a Munsif vested with powers of a Small Cause Court Judge is the Court to whom an appeal would ordinarily lie from each of them. This argument was strongly assailed in reply; and in our opinion, it is not well founded. The Subordinate Judge or Munsif vested with powers of the Small Cause Court's Judge exercises, while acting as such, a different and wholly distinct jurisdiction from that which they exercise either as a Subordinate Judge or as a Munsif; and consequently that the limitations and rights and obligations attaching to their jurisdiction as a Subordinate Judge or a Munsif cannot affect the rights and obligations which they exercise in their capacity as a Judge of a Small Cause Court. The two jurisdictions are materially independent of each other.

In the alternative the Government-Advocate contends that then the present applications are governed by Cl. (c), sub-S. (7), and he argues that in every case where no appeal lies from a Court that then the authority to review a grant or refusal to sanction a prosecution is the principal Court of original jurisdiction within the local limits of whose jurisdiction such first-mentioned Court is situate and he urges that this applies in every case whether it be civil, criminal or revenue.

The learned Government-Advocate concedes that no appeal lies directly from a Small Cause Court to the District Judge's Court as such, save within the limits of S. 24, Small Cause Courts Act; but he contends that Cl. (c) was not designed to create new or disestablish existing rights or to fetter a jurisdiction antecedently existing, but that it was merely designed to constitute an authority which should be deemed for the purpose of Cl. (c) as the authority capable of reviewing a sanction to prosecute granted or refused by a Court from which no appeal lay. In the prior Code of Criminal Procedure in 1882, the clause which

corresponds to Cl. (c), sub-S. (7) of the present Code provided that in the case of Small Cause Courts the right of review in matters of sanction should rest with the Sessions Court. This was an extraordinary provision to have enacted, inasmuch as the Court of Session as a Criminal Court had no jurisdiction whatsoever over a Court of Small Causes. However the enactment contained in the prior Code of 1882 may be regarded to afford some indication of why the change was made in Cl. (c) as it at present stands; the idea being to take away the power of review from the Sessions Court, viz., a criminal Court, and giving it to the civil Court of principal original jurisdiction in which the Small Cause Court is within the limits of the territorial jurisdiction of the District Court situate. The later enactment is no more arbitrary than the prior enactment, and for apparent reasons the principal civil Court was given a special jurisdiction to review sanctions granted by a Court exercising a civil jurisdiction from whom no appeal lay.

District Judge is defined by Cl. 15, General Clauses Act of 1897 as being the Judge of the principal Court of original jurisdiction in which the District Court is situate. It would appear that there is no corresponding statutory enactment defining a principal Court of original jurisdiction referable to criminal and revenue matters and proceedings; but by analogy it would seem to be that in criminal cases the District Magistrate is the Court of original criminal jurisdiction, while in revenue cases the Collector is the Court of original jurisdiction. Shortly summarised, therefore Cl. (c) clearly appears to bear the interpretation that where no appeal lies from a Court administering civil, criminal or revenue jurisdiction respectively, that then the principal Court of each of such classifications of jurisdiction shall be deemed the principal Court for reviewing sanctions granted or refused by a Court in respect of each from which no appeal lies. It was contended by Mr. Yunus that the Small Cause Court, though a Court, is not a civil Court; and the only ground suggested to support such a contention was that the Small Cause Court as a civil Court was not mentioned in the enumeration of civil Courts specified in the Civil Courts Act.

With great respect to Mr. Yunus's argument we think it is entirely and absolutely unfounded. The test is not whether the Court is within the purview of the Civil Courts Act; but whether it is a Court constituted for the administration of civil justice, and regulating the civil rights of His Majesty's subjects inter se. Undoubtedly the Small Cause Court is a Court exercising civil jurisdiction, and as such is within the general scope and purview of S. 195, Criminal P. C.

However the question which we have to consider has been recently the subject of a considered judgment of a Full Bench of the Allahabad High Court, presided over by the Acting Chief Justice, with his colleagues Piggott and Walsh, JJ. The Allahabad High Court unanimously held that the decision of Sir Edward Chamier reported as *Ajudhya Prasad v. Ram Lal* (2) was an erroneous expression of the law; and the Allahabad High Court reversed the authority of the decision, which was challenged, and likewise the Allahabad High Court dissented in strong and definite terms from the decisions of this Court reported as *Ambica Tewary v. Emperor* (3) and *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4). By the ruling of the Full Bench of the Allahabad High Court it is now the positive law of the United Provinces that Cl. (3), sub S. (7), S. 195, Criminal P. C., applies to a Small Cause Court, and that the authority to review its orders granting or refusing sanction to prosecute is the District Court in which such Small Cause Court is situate.

Following the decisions already referred to in this Court the matter was also agitated in the Calcutta High Court and discussed in a ruling reported as *Nibaran Chandra v. Akshoy Kumar Banerjee* (6), and in that case the learned Judges of the Calcutta High Court held that it had always been the universal practice in Bengal that in respect of Small Cause Courts constituted under the Provincial Small Cause Courts Act of 1887 that the District Court was the Court to review grants or refusals of sanctions to prosecute made by a Small Cause Court; and that the practice was too long settled and too firmly established to admit of being reviewed at so late a period of time, and accordingly the Calcutta High Court declined to follow the decisions of this

Court reported as *Ambica Tewary v. Emperor* (3) and *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4) respectively. So also in a ruling reported as *Jamna Das v. Sabapathy Chetti* (7) the High Court of Madras declined to follow the decisions of this Court. It has been stated more than once by distinguished Judges of this Court that where a uniform course of practice existed referable to particular legal principles in the province of Bengal before the partition, that then this Court would recognize such practice in the administration of law in this province. Therefore on the grounds of continuity from long-established practice I would have thought that in this province at least a new departure would not have hastily embarked on without consideration which was inconsistent with the prior existing practice prevailing in old Bengal when the present province of Behar and Orissa fell within its jurisdiction.

However the decision of Sir Edward Chamier reported as *Ajudhya Prasad v. Ram Lal* (2) having been so severely criticized, the entire foundation to support the authority of his pronouncement in this Court as declared in the ruling reported as *Ambica Tewary v. Emperor* (3) loses much of its weight. Having considered very carefully all the authorities, and finding that in all the other High Courts in India the practice is in conformity with the law as now declared by the Full Bench ruling in the Allahabad High Court, we are of opinion that the law laid down in *Ajudhya Prasad v. Ram Lal* (2) and the two subsequent cases in this Court reported as *Ambica Tewary v. Emperor* (3) and *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4) can no longer be regarded as a sound or proper legal interpretation of S. 195, Criminal P. C. Just one additional word. Cl. (c) only deems a certain Court to be an authority to review a sanction granted or refused by a Small Cause Court. It in no way affects the antecedent jurisdiction of the Small Cause Court, nor does it enlarge the powers of the District Court, viz., the principal Court within whose local limits the Small Cause Court is situate. S. 195 merely provides that the District Court shall be deemed, viz., shall be considered or taken to be the authority to review; and this is so irrespective of the fact that the District

(6) [1917] 41 I. C. 311.

(7) [1911] 36 Mad. 138=12 I. C. 521.

Court as the principal Court of original jurisdiction is not a Court in respect of which the Small Cause Court stands in any relationship in the exercise of its original jurisdiction as such. Consequently the majority of this Court is of opinion that the application as presented on behalf of the petitioners to the High Court is not entertainable under the provisions of S. 195, Small Cause Courts Act, and that the proper Court to review the order of the Small Cause Court is the District Court of Chapra.

The law however has been in some doubt; and therefore we think it would be unfair to the petitioners to deprive them now of exercising the right to which we believe they are entitled as a result of this decision. Accordingly we shall give the petitioners leave to withdraw the applications made to this Court with a view of presenting the same to the District Court for its consideration, as the authority indicated by law to review orders made in such cases as the present. Sanctions granted or refused by a Small Cause Court may come before this Court in its revisional jurisdiction under S. 115, Civil P. C., or possibly under S. 107, Government of India Act, but not certainly under the provisions of S. 195, Criminal P. C., which is self contained and marks out and defines the procedure applicable in its own terms. Accordingly both these petitions are dismissed.

Das, J.—I concur in the judgment delivered by Atkinson, J.

Jwala Prasad, J.—The question for determination is:

“whether an order granting sanction to prosecute by a Judge of a Small Cause Court is appealable under the provisions of S. 195, Criminal P. C.; and if an appeal is sustainable, to what Court does such an appeal lie.”

The first part of the question must be answered in the affirmative. Although, strictly speaking, there is no right of appeal against an order giving or refusing sanction under S. 195, Criminal P. C., any person aggrieved by such an order is entitled to apply for the setting aside of the same. Such a right was given by the former Code of Criminal Procedure of 1882, under which an application against an order passed by a Small Cause Court under S. 195 was entertainable by the Court of Sessions for the division within which the Small Cause Court was situate and to which it was declared to be subordinate by an express enactment in the

section. The present Code has only omitted the provision of the former Code declaring a Court of Small Causes to be subordinate in the matter of giving or refusing sanction to the Court of Sessions but has not taken away the substantive right of making an application to a superior authority. The right has been reaffirmed in clear and unambiguous terms in sub-S. 6, which provides that

“any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate.”

The word “authority” has been advisedly used in the subsection in order to include a “public servant” where sanction is given or refused under Cl. (a), sub-S. (1), in respect of offences mentioned therein, and a “Court” where sanction is given or refused under Cls. (b) and (c), sub-S. (1). In either case the sanction given or refused may be revoked or granted by the authority to which the “public servant” or the “Court,” as the case may be is subordinate. A sanction given or refused by a Judge of a Small Cause Court comes under Cl. (b) or (c), sub-S. (1) and is liable to be revoked or granted by any authority to which the Court of Small Causes is subordinate and an application for the same purpose may be made to such an authority. In order therefore to answer the second part of the reference, namely, to what Court an application against the order made by a Small Cause Court under S. 195 would lie, it is necessary to find out the authority to which a Court of Small Causes is subordinate. Under S. 3, Civil P. C., and the Small Cause Courts Act, S. 28, a Court of Small Causes is subordinate both to the District Court and the High Court within the territorial limits of which the Small Cause Court is situate. By “District Court” is meant the principal civil Court of original jurisdiction within the local limits of a district presided over by a District Judge [vide S. 2 (4) Civil P. C. and S. 3 (15), General Clauses Act.] Accordingly, Piggott, J. in the Full Bench case of *Chidda Lal v. Bhajan Lal* (5) came to the conclusion that

“the Judge of a Court of Small Causes is an authority subordinate, within the meaning of sub-S. 6, both to the High Court and to the District Court. . . . and that according to this subsection therefore a person against whom an order giving sanction has been passed by a Judge of a Small Cause Court would be entitled to

pply for revocation of the same either to the District Judge or to the High Court."

With this view I entirely agree. It is however contended that under sub-S. 7 a Small Cause Court should be deemed subordinate only to the District Court and that the right of making an application under sub-S. 6 is therefore restricted to that Court only. Sub-S. 7 runs as follows:

"For the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie, that is to say: (a) where such appeals lie to more than one Court, the appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate; (b) where such appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case in connexion with which the offence is alleged to have been committed; (c) where no appeal lies, such Court shall be deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction such first mentioned Court is situate."

It has to be seen whether and which of the aforesaid Cls. (a), (b) and (c) of sub-S (7) would apply to a sanction given by a Court of Small Causes. Broadly speaking, no appeal ordinarily lies from the decision of a Court of Small Causes and hence the main sub-S. 7 with Cls. (a) and (b) has obviously no application. The doubt and difficulty has hitherto arisen with respect to Cl. (c) only, but the learned Government Advocate contends that Cl. (a) would apply to a sanction given by a Subordinate Judge in the exercise of his jurisdiction as a Judge of a Court of Small Causes conferred upon him under S. 25, Civil Courts Act 12 of 1887. It is argued that an appeal ordinarily lies from the decision of a Subordinate Judge exercising civil jurisdiction under the Civil Courts Act, and hence even in respect of his orders passed in the exercise of his jurisdiction vested under S. 25, Civil Courts Act, as a Judge of a Small Cause Court from which there is no appeal, it must be held for the purposes of sub-S. 7, S. 195, Criminal P. C., that an appeal ordinarily lies. Hence applying S. 21, Civil Courts Act, under which an appeal from the decision of a Subordinate Judge ordinarily lies either to the District Judge or the High Court according to the value of the suit, it is said that the former Court, being "the appellate Court of inferior jurisdiction," should be deemed to be the Court to which a Subordinate Judge ex-

ercising powers of a Small Cause Court is subordinate under Cl. (a), sub-S. 7. The argument, no doubt, was very ingenious and at first sight appeared to be plausible, but looking closely into the matter there does not appear to be much substance in it.

It is conceded that the clause has no application to the sanction granted by a Court of Small Causes established under S. 5, Provincial Small Cause Courts Act 9 of 1887. The distinction is sought to be made between the Court so constituted and that of a Subordinate Judge vested with the powers of a Small Cause Court under S. 25, Civil Courts Act. This is a distinction without any difference. The answer to the aforesaid contention is to be found in Ss. 4 and 33, Provincial Small Cause Courts Act. These sections make it perfectly clear that a Court of a Subordinate Judge, while trying suits cognizable by a Court of Small Causes under powers vested by S. 25, Civil Courts Act, is a Small Cause Court within the meaning of S. 4 of the said Act and exercises jurisdiction quite distinct from and independent of his jurisdiction as a Court of civil jurisdiction under the Civil Courts Act.

Sections 24, 25 and 27, Small Cause Courts Act, will therefore apply to decrees or orders passed by a Court of Subordinate Judge while exercising powers under the Small Cause Courts Act, and no appeal will ordinarily lie from the decree or order of that Court. Cl. (a) sub-S. 7, has therefore no application to the present case and the contention of the learned Government Advocate must fail. Cl. (b), sub-S. 7, also has obviously no application.

It then remains to be seen whether sanction given by a Court of Small Causes comes under Cl. (c) of the subsection. If this clause is read as a distinct and separate subsection, a Court of Small Causes might come under it inasmuch as no appeal lies from a Court of Small Causes. But if this clause is read as a part of and as explanatory of sub S. 7, it would be difficult to apply this to a Court of Small Causes for sub-S. 7 applies only to a Court from which appeals "ordinarily lie." In the case of *Ajudhya Prasad v. Ram Lal* (2), Champier, J., although the matter did not directly arise in that case, held that the whole sub-S. 7 and with it Cl. (c) did not apply to a Court of Small Causes, inasmuch as that subsection is

"confined to Courts against whose decisions or some of whose decisions appeals do lie" as the opening words of the subsection clearly indicate, and hence the words in Cl. (c) "where no appeal lies" did not.

"refer to Courts against none of whose decisions an appeal lies but to refer to particular cases in which no appeal lies."

Karamat Hussain, J., agreed in this view and in support of it quoted his own decision in *Wazir Mohammed v. Hub Lal* (8). The point directly arose subsequently in this Court in the case of *Ambica Tewari v. Emperor* (7) and Sir Edward Chamier, then Chief Justice of this Court, adhered to the opinion expressed by him in the aforesaid Allahabad case and held that Cl. (c) sub S. 7 cannot be construed as if it were an independent subsection. This view was followed by Roe, J., in a later decision of this Court in *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4), where the learned Judge held that the words, "that is to say",

"indicate not that a supplementary provision is to be found in Cl. (c), but merely an explanation of the words to which an appeal ordinarily lies."

This view has since been acted upon by this Court in several cases without any discussion. Placed as Cl. (c) is, namely as a subordinate clause to sub-S. 7 and introduced into it by the words "that is to say," it is difficult to disagree with the view taken in the aforesaid cases and to hold that Cl. (c) does anything more than explaining and elucidating the opening words of the subsection, namely,

"for the purposes of this section every Court shall be deemed subordinate only to the Court to which appeals from the former Court ordinarily lie."

The difficulty in applying the clause to a Court of Small Causes created by the words "that is to say" in sub-S. 7 has been felt by almost all the learned Judges who had to construe it. I would now discuss the cases in which a contrary view was taken and Cl. (c) was applied to orders made by a Small Cause Court. In the case of *Nibaran Chandra v. Akshoy Kumar Banerjee* (6) it was expressly said that the words "that is to say" in sub-S. 7, when read with sub-Cl. (c), "entail a difficulty". But the sub-clause was applied to the Court of Small Causes not on the ground of true construction of it, but on the ground of practice and of analogy drawn from the fact that the

Presidency Small Cause Court is subordinate to the original side of the Calcutta High Court and hence the Provincial Small Cause Courts should be deemed to be subordinate to the District Courts. The decision of the Madras High Court in *Appava Kavundan, In re* (9) is of no assistance for the purpose of construing the clause, inasmuch as it has not given any reason, or discussion for the view taken by it. This difficulty was got over by a Full Bench of the Allahabad High Court in the case of *Chidda Lal v. Bhanjan Lal* (5) by trying to omit the words "that is to say" from sub-S. 7 altogether while construing Cl. (c), or by putting a loose interpretation upon the words in order to give effect to an intention of the legislature, namely, to restrict the right of application under sub-S. 6 in respect of orders made by a Small Cause Court to one Court instead of to two Courts, as would have been the case if Cl. (c) had not applied.

In order to determine whether this was the "legislative intent," let us look to the law on the point prior to the present Code and the object with which Cls. (a), (b), and (c) were inserted in the present Code. S. 195 of the Code of 1882 simply provided that the Court giving or refusing sanction should be deemed to be subordinate only to the Court to which appeals ordinarily lie, and there were no provisions similar to those in Cls. (a), (b) and (c) of the present Code. This led to conflicting rulings and Cls. (a), (b) and (c) were added in the present Code with a view to getting rid of the difficulty. Cl. (a) provides for the case of a subordinate Court against whose decisions appeals lie to two different Courts of different grades. For instance, under S. 21, Civil Courts Act, an appeal lies to the District Court and the High Court according to the value of the suit decided by a Subordinate Judge. Cl. (b) provides for the case of a subordinate Court against whose decisions appeals lie to two different kinds of Courts: for instance, Civil and Revenue Courts in certain rent cases. Cl. (c) provides for cases where appeals ordinarily lie from the decisions of a Court, but no appeals lie in particular cases. The object of adding clauses in the present Code to the provision in sub-S. 7 was only to explain and elucidate sub-S. 7 and to meet the exigencies

(8) [1909] 31 All. 313 = 2 I. C. 182.

(9) [1916] 36 I. C. 878.

created by the conflicting authorities under the old Code. Neither in the old nor in the present Code, a Court of Small Causes comes under the main provision in sub-S. 7.

Again the legislature does not pretend to restrict the right of making an application under sub-S. 6 to one public servant as a superior authority, where sanction is given by a public servant under sub-S. (1) (a), S. 195. Take the case of a Sub-Inspector of Police or an Excise Sub-Inspector, who is subordinate to more than one officer, where an order giving or refusing sanction by him may be set aside by any one of the public servants to whom he may be subordinate. There are many instances of a public servant being subordinate to more than one authority. Why should we then assume an intention of restricting the right to make an application to one Court only as a superior "authority" referred to in the said sub-S. 6, unless such an intention is clearly expressed by the legislature? This intention of course is clear in the case of a Court giving or refusing sanction from which an appeal ordinarily lies, but in the particular cases no appeal lies. The intention is not clear in the case of a Court from which no appeal at all lies, as in the case of a Small Cause Court. There is therefore no justification for reading Cl. (c) as a separate subsection, or to interpret it otherwise than its plain language, its position and the grammatical construction indicate, on the ground of carrying out effectually the intention of the legislature. The intention of the legislature to include a Small Cause Court within Cl. (c) is not clearly established.

This clause was however applied to a Small Cause Court in the case of *Nibaran Chandra v. Akshoy Kumar Banerjee* (6), on the analogy that as a Presidency Small Cause Court is subordinate to the High Court within the limits of whose jurisdiction it is situate, it would appear to follow that a Provincial Small Cause Court is similarly subordinate for the purposes of S. 195 to the Court of the District Judge. This analogy has been quoted with approval in the Allahabad Full Bench case of *Chidda Lal v. Bhajan Lal* (5). But the analogy does not hold good, inasmuch as under S. 6., Presidency Small Cause Courts Act, the High Courts of Judicature at Fort William in Bengal,

Madras and Bombay have been expressly declared to be the only Courts to which the Presidency Small Cause Courts are subordinate; whereas the Small Cause Courts Act and the Code of Civil Procedure have declared a Small Cause Court to be subordinate both to the District Court and the High Court.

Again, the cases already adverted to have referred to the prevailing practice, whereby the District Judge exercises jurisdiction in respect of sanction given or refused by a Court of Small Causes. This practice necessarily must have grown after 1898 when the new Code came into operation, for prior to that the Sessions Judge was declared by an express provision in the Code of 1882 to be the authority to which a Court of Small Causes was to be deemed subordinate for the purposes of S. 195. There are therefore not many reported cases relating to the practice referred to above. On the other hand, within these few years the views taken in the different High Court have been different. It is more than doubtful if there has been a uniform interpretation of the statute and that that interpretation has been adhered to without interruption, or that the practice has been so general and of such a long standing that it has taken the place of a settled law in the province: vide Maxwell on the Interpretation of Statutes. On the other hand, the decision in the case of *Ambica Tewary v. King Emperor* (3), passed soon after this Court was created, has been followed by this Court in several reported and unreported cases. I would therefore not rely upon practice for the determination of the question before us as to which Court should have power under S. 195 to set aside an order passed by a Small Cause Court. I therefore hold that on none of the grounds of "legislative intent," "analogy" or "practice," sub-S. 7 or any of its sub-Cls. (a), (b) and (c) applies to a Court of Small Causes. In the view that I have taken it is unnecessary to consider what would be "the principal Court of original jurisdiction" referred to in Cl. (c) as the authority to which a Small Cause Court should be deemed subordinate in case the said clause did apply.

I would only observe that the omission on the part of the legislature to define "the principal Court of original jurisdic-

tion" has created hopeless difficulties and conflict of opinions. It is said that the said words must be construed to be the principal civil, criminal and Revenue Court of original jurisdiction according as the order passed under S. 195 be by a civil, criminal or Revenue Court respectively, and in support of this subsection, S. 195 is referred to. In that subsection the legislature no doubt has declared that

"in Cls. (b) and (c) of sub-S. (1), the term 'Court' means a civil, Revenue or criminal Court,"

but that definition is expressly restricted to the Cls. (b) and (c), sub-S. (1) and has not been declared to apply to the rest of the section including sub-S. (7). Again, the difficulty is not solved by reading the words "civil, criminal or revenue" in the said clause, for there is no definition in the General Clauses Act or anywhere else of a principal Court of original, criminal or revenue jurisdiction, though "the principal civil Court of original jurisdiction" has been defined by Cl. 15, S. 3, General Clauses Act, to mean the Court of a District Judge. Much is left to surmise and guess in order to find out what Court is meant by the legislature in using the said expression in Cl. (c). Mr. Yunus argues that with regard to suits cognizable by a Small Cause Court, the Small Cause Court itself is a principal Court of original jurisdiction and not the District Court. [This was the view of Roe, J., in the case of *Sukhdeo Singh v. District Magistrate of Muzaffarpur* (4)]. The fallacy of the argument is that if the legislature intended to apply this clause to a Court of Small Causes, it must have intended to convey by the words "the principal Court of original jurisdiction" some Court other than the Small Cause Court itself, for the simple reason that the clause would be without any meaning and would frustrate the object in pointing to a superior authority which would have power to set aside the sanction given or refused by a Small Cause Court.

It is next argued that "the principal Court of original jurisdiction" with regard to Small Cause Court cases must be held to be the High Court. But the High Court of Patna has no ordinary original civil jurisdiction "to receive, try and determine any suit." Under S. 9 of the Letters Patent constituting this Court,

it has only "extraordinary original civil jurisdiction" "to remove, and to try and determine a suit" within the jurisdiction of any Court subordinate to its superintendence. The distinction is noteworthy. The power to receive a suit constitutes original jurisdiction and power to remove a suit constitutes extraordinary jurisdiction. This Court has no original jurisdiction to receive and entertain a Small Cause Court suit.

However, had Cl. (c) sub-S. 7 applied, it would have been possible to hold that the legislature intended that a Small Cause Court in respect of orders made by it under S. 195 should be deemed subordinate to the District Court as being the principal Court of original civil jurisdiction within the meaning of S. 2 (4), Civil P. C., and S. 3 (15), General Clauses Act, notwithstanding the difficulties created by the inartistic drafting of the section. But I have already held that according to the true construction, sub-S. (7), with all its sub-Cls. (a) (b) and (c), does not apply to Courts of Small Causes. We have therefore to find out the superior authority referred to in sub-S. (6) uncontrolled in any way by sub-S. (7). It has already been shown that such an authority competent to deal with sanction given or refused by a Court of Small Causes will be both the District Court and the High Court within the meaning of that subsection. I therefore, do not accept the view taken by this Court that the application could not be made to the District Court, or the view taken by the other High Courts that the application could not be made to the High Court. Had the legislature intended to restrict the jurisdiction of entertaining applications under S. 195, Cl. (6), to one Court only, the intention should have been expressed clearly and they failed to carry out their intention, if any by the language employed in S. 159, to which only we should refer for the purpose of interpreting the statute and its intention, instead of roaming over the previous law and the authorities thereunder: vide the dictum of Lord Herschell in *Bank of England v. Vagliano* (10). The drafting of S. 195 has been criticized by several Judges and it may be of some use to note incidentally that in the proposed bill for the amendment of the Code of Criminal Pro-

cedure I do not find any suggestion to define the subordination of Courts for the purpose of S. 195.

As the two Courts, the District Court and the High Court, have concurrent jurisdiction over the orders passed by a Court of Small Causes, it will be open to the High Court to refuse to entertain an application under sub-S. (6), S. 195, unless the party aggrieved had in the first instance moved the District Court. I would therefore hold that as a matter of procedure it should be ruled that in such a case an application should in the first instance be made to the District Court. This will be reasonable, inasmuch as it will save trouble and expense to the party concerned in coming to the High Court instead of having his redress in the District Court. And at the same time a second opportunity would perhaps be afforded to the aggrieved party to come to the High Court either under sub-S. (6), S. 195 or under the powers vested in the High Court by S. 115 of the Civil P. C., or S. 107, Government of India Act.

I would therefore answer the second part of the reference as follows:—

That under sub-S. (6) S. 195 an application can be made both to the District Court and to the High Court for the purpose of revoking or granting a sanction given or refused by a Court of Small Causes. But as a matter of procedure the High Court should not entertain an application except under special circumstances, unless such an application was first presented to the District Court.

V.S./R.K. *Petition dismissed.*

A. I. R. 1919 Patna 361

IMAM, J.

Hari Lal Choudhry and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 103 of 1918, Decided on 8th April 1918.

(a) Criminal P. C. (5 of 1898), Ss. 203 and 437—Magistrate not issuing process against some accused and convicting others—Application to proceed against remainder after conviction—District Magistrate setting aside order without notice—District Magistrate had jurisdiction to proceed under S. 437 and no notice was necessary as accused never appeared.

One S instituted a criminal case against eleven persons. The Magistrate instituted proceedings

only against some of them and after their conviction rejected the petition of the complainant to issue process against the remainder. On application by the complainant the District Magistrate under S. 437 ordered the remaining accused to be proceeded against. No notice was issued to the accused prior to the passing of the order:

Held: (1) that the order of the Magistrate refusing to issue process amounted to a discharge and that the District Magistrate had therefore jurisdiction to proceed under S. 437: 32 Cal. 783, *Foll.*; (2) that no notice was required to be issued to the accused inasmuch as they had never appeared before a Magistrate nor been formally discharged. [P 362 C 1]

(b) Criminal P. C. (5 of 1898), S. 437—In ordering retrial notice is not necessary when accused have not appeared.

Before an order is made under S. 437 it is not necessary that notice should in all cases be served upon the accused. Notice is necessary only in those cases where the accused have already appeared and have been discharged. In cases where the accused have not appeared before the Magistrate and taken their trial, no such notice is necessary: 39 Cal. 238 and 12 C. W. N. 822, *Dist.*; 15 Cal. 608 (*F.B.*) and 29 Cal. 457, *Foll.* [P 362 C 1]

Gour Chandra Pal—for Petitioners.

Asst. Govt. Advocate—for the Crown.

Judgment.—The facts of this case are shortly these: One Sheonandan Singh instituted a criminal case against eleven persons, including the petitioners. Out of these eleven some were tried and convicted. After their conviction the private prosecutor happened to die and one Jugrup Singh, his uncle, applied to the Subdivisional Officer of Hajipur for summoning the petitioners to take their trial. The Subdivisional Officer rejected this petition, on the ground that the case had been adequately dealt with by the first trial. Thereupon Jugrup Singh moved the District Magistrate of Mozafferpur, who ordered the petitioners to be proceeded against. The learned vakil appearing on behalf of the petitioners has taken two points on which he asks me to hold that the order of the District Magistrate of Muzafferpur is ultra vires.

The first contention is that there should have been notice served upon his clients before an order under S. 437, Criminal P. C., could have been passed. Reliance for this contention is placed upon *Ambar Ali v. Anjab Ali* (1) and *Girdhari Marwar v. Emperor* (2). On the authority of these rulings it is contended that the order without notice is bad. The learned Assistant Government Advocate appearing on the other side has drawn my at-

(1) [1912] 39 Cal. 238=14 I. C. 703.

(2) [1908] 12 C. W. N. 822.

tention to *Girish Chunder Ghose v. Emperor* (3) and *Hari Das Sanyal v. Saritulla* (4). His contention is that notice in all cases under S. 437, Criminal P. C., is not necessary. He argues that such notice is necessary only in those cases where the accused have already appeared and have been discharged. In cases where the accused have not appeared before the Magistrate and taken their trial, he contends no such notice is necessary. I agree in the contention raised by the Assistant Government Advocate. The authorities he has cited clearly draw a distinction between the cases covered by *Ambar Ali v. Anjab Ali* (1) and *Girdhari Marwari v. Emperor* (2), above referred to, and the case before me. On the facts of this case it is quite evident the petitioners, as a matter of fact, never had appeared before any Magistrate and therefore the authorities relied upon by the Assistant Government Advocate apply to the present case.

The second point on the question of jurisdiction raised on behalf of the petitioners is that the District Magistrate of Muzafferpore had no jurisdiction at all to direct a further inquiry into this case. There is no substance in this contention. The point is concluded by the authority of *Ajab Lal Khirher v. Emperor* (5). The order of the Subdivisional Officer in this case refusing to try the petitioners amounts to a discharge and the jurisdiction of the District Magistrate under S. 437, Criminal P. C., remains. In the circumstances the application is rejected.

V.S./R.K. *Application rejected.*

(3) [1902] 29 Cal. 457.

(4) [1888] 15 Cal. 608 (F.B.).

(5) [1905] 32 Cal. 783.

A. I. R. 1919 Patna 362

DAS, J.

Kusum Sao—Accused—Petitioner.

v.

Janak Lal—Opposite Party.

Criminal Revn. No. 69 of 1919, Decided on 8th April 1919, against order of Addl. Sess. Judge, Champaran, D/- 22nd January 1919.

(a) Criminal P. C. (5 of 1898), S. 195—“Appeal ordinarily lies”—Additional Sessions Judge is competent to grant sanction in matter arising out of a trial before First Class Magistrate.

An Additional Sessions Judge is competent to grant sanction to prosecute in a matter arising out of a trial before a Magistrate having first class powers, inasmuch as an appeal would ordi-

narily lie from the Court of the latter to the Court of the former. [P 363 C 1]

(b) Criminal P. C. (5 of 1898), S. 195—Discretion should be exercised cautiously.

In dealing with an application for sanction to prosecute, the Court to which the application is made ought to proceed with caution and discernment, and be guided by two principles, namely, (1) whether there is a *prima facie* case against the person for whose prosecution sanction is asked, and (2) whether the real object of the applicant is not to satisfy his private ends or personal spite. [P 364 C 1]

(c) Penal Code (1860), S. 211—Sanction for prosecution under S. 211, when should be granted enunciated—Criminal P. C. (1898), S. 195.

The mere acquittal of an accused person is not sufficient for sanctioning a prosecution under S. 211, there must be something more; there must be a reasonable belief in the mind of the sanctioning Court that there was no foundation whatever for the criminal charge; in other words, there must be a belief that in instituting criminal proceedings the petitioner acted knowingly without belief in the truth of the allegations made by him or recklessly without caring whether the allegations were true or false, and the judgment of the trial Court ought to show that there was no foundation whatever for the criminal case against the persons who were acquitted. [P 364 C 1, 2]

Gaur Chandra Pal—for Petitioner.

Hasan Imam and Harnarayan Prasad—for Opposite Party.

Judgment.—This application is directed against the order of Additional Sessions Judge of Champaran granting sanction to the opposite party under S. 195, Criminal P. C., to prosecute the petitioner under S. 211, I. P. C. The facts and circumstances leading up to the application for sanction have been fully stated in the judgment of the Additional Sessions Judge and I do not propose to recapitulate them. It appears that in the first instance the District Magistrate of Champaran granted such sanction. Against this there was an appeal to the Court of Session, and a point was taken before it that the District Magistrate had no power to grant such sanction as the alleged offence was not committed in, or in relation to, any proceeding in that Court or in a Court subordinate to that Court. In view of that objection a petition was filed before the Additional Sessions Judge, who heard the appeal for fresh sanction, and the Additional Sessions Judge, while holding that the District Magistrate had power to grant the sanction, acted on the fresh application made before him and himself granted fresh sanction.

At the very outset it was contended by Mr. G. C. Pal that the sanction granted

by the District Magistrate was illegal. This was conceded by Mr. Hasan Imam who appeared on behalf of the opposite party, but he argued that the Additional Sessions Judge was competent to grant sanction and that he did in fact grant sanction for the prosecution of the petitioner under S. 211, I. P. C. If the Court which heard the criminal case be subordinate to the Court of the Additional Sessions Judge, that is to say, if appeals from the former Court ordinarily lie to the Court of the Additional Sessions Judge, then undoubtedly the Additional Sessions Judge had power to grant sanction in this case. Mr. Pal has taken me through the various sections in the Criminal Procedure Code for the purpose of making his point that a Magistrate having First Class powers is not subordinate to an Additional Sessions Judge. It will be noticed however on reference to S. 195, Civil P. C., that the word deliberately used by the legislature is "Court" and not "Judge", and the point for my determination is not whether a Magistrate having First Class powers is subordinate to the Additional Sessions Judge, but whether an appeal would ordinarily lie from a Court of a Magistrate having First Class powers to a Court of an Additional Sessions Judge. Now it cannot be disputed that an appeal would ordinarily lie from a Court of such a Magistrate to the Court of Session. If an appeal would lie from the Court of such a Magistrate to the Court of Session, such appeal can, in my opinion, be disposed of only by the Court of Session. Therefore the point for investigation narrows down to this: what is the Court of Session? In my opinion S. 409 makes it perfectly clear that a Court of Session consists of the Sessions Judge and the Additional Sessions Judge. I hold therefore that the Additional Sessions Judge was competent to grant sanction in a matter arising out of a trial before a Magistrate having First Class powers. The substantial question that has however been argued before me is that the Additional Sessions Judge did not act properly or with discretion in granting sanction in this case. The learned Judge says:

"It has been laid down in the case reported as *Mr. Hume, Public Prosecutor of Calcutta v. Paresh Chandra Ghosh, An Attorney* (1) that on an application for sanction the Court is not to

try the guilt or innocence of the person for whose prosecution sanction is asked for, but is merely to consider whether the statutory bar imposed by S. 195, Criminal P. C., should be removed and the law allowed to take its ordinary course. What is however required to be seen is that no one be permitted to use the penal law merely to satisfy his own private ends or personal spite."

As in my experience the judgment of the great and distinguished Judges who heard that case has frequently been misunderstood and misapplied, I propose to deal with that case as shortly as I can, in order to show that that case was decided on its own facts and that the learned Judges did not intend to lay down any general proposition applicable to all cases. It is to be noted in the first place that there was in that case an inquiry as full and searching as the late Chief Justice of the Calcutta High Court knew how to make it, before the learned Judges made up their mind to remove the statutory bar imposed by S. 195. They held the inquiry themselves and allowed witnesses to be examined and cross-examined before them. Not content with this, they placed the papers before Mr. Hume, the Public Prosecutor, "with complete confidence," as the Chief Justice says, "in his absolute integrity."

The passage which has been cited from the judgment of the learned Chief Justice by the learned Judge has in my experience been relied on by the Subordinate Courts as completely doing away with their responsibility in the matter, although the judgment of Choudhuri, J., in the same case makes it perfectly clear that the power to grant sanction is evidently discretionary and has got to be exercised with caution and discernment. I accept the proposition of law enunciated in the passage cited, for it seems to me that if the sanctioning Court were to try the guilt or innocence of the person for whose prosecution sanction is asked, his subsequent trial would degenerate, to use the words of Chaudhuri, J., "into a mere formality;" but, on the other hand, if an application for sanction is regarded merely as a mechanical device for removal of the bar, the rule imposing a bar on prosecutions under certain sections specified in S. 195, Criminal P. C., would appear to be a meaningless absurdity. I do not read the judgments delivered in that case as overruling, either expressly or by necessary implication, the series of cases that have been decided with refer-

(1) A. I. R. 1914 Cal. 557=41 Cal. 734=22 I. C. 324.

ence to S. 195, except such as have gone too far and have laid down that an application for sanction must be conducted on the same lines as a criminal trial. When the late Chief Justice says that he prefers to take his stand upon the section itself he is, in my opinion, merely protesting against the extreme argument advanced by Mr. Norton, and not in any way throwing any doubt on the rules of prudence which have been enunciated by eminent Judges as rules to which any Court exercising its discretion would have recourse. The learned Chief Justice himself refers to one of such rules of prudence, which is not to be found in the section itself, but which has been read into the section as of universal application by successive generations of eminent Judges. The truth appears to be that the legislature has deliberately vested the sanctioning Court with absolute discretion in the matter, because it is impossible to lay down rules governing all cases and new circumstances may arise calling for application of new principles. In my judgment the case of *Mr. Hume, Public Prosecutor of Calcutta v. Paresh Chandra Ghose, an Attorney* (1) has left the law exactly where it stood, and in dealing with an application for sanction the sanctioning Court must still proceed with caution and discernment and must be guided by two principles which, in my opinion, have been well established, namely, (1) whether there is a prima facie case against the person for whose prosecution sanction is asked, and (2) whether the real object of the applicant is not to satisfy his private ends or personal spite. Now, how has the Additional Sessions Judge dealt with this matter? He says :

"I am therefore not to see in this case as to whether the case brought by the appellant was true or false, but whether in view of the finding of the learned Deputy Magistrate who tried the case and found the principal point of the case to be false, sanction should be granted."

He does not record his opinion that there is a prima facie case or, for the matter of that, any case against the petitioner. But he evidently thinks that the finding of the Deputy Magistrate was something upon which he could proceed. Now it seems to me that the legislature has said as plainly as it knows how to say that the mere acquittal of the accused person is not sufficient for sanction

for prosecution under S. 211, I. P. C. If that were enough, there would be no meaning in imposing a bar on such prosecutions, and every acquittal would be followed by an application for sanction to prosecute. There must be something more than mere acquittal; there must be a reasonable belief in the mind of the sanctioning Court that there was no foundation whatever for the criminal charge; there must be a belief that in instituting criminal proceedings the petitioner acted knowingly without belief in the truth of allegations made by him or recklessly without caring whether the allegations were true or false. The judgment of the trial Court in this case does not show that there was no foundation whatever for the criminal case against the persons who were acquitted. I have read the judgment of the Magistrate and the record of the case with great care and I am bound to say that they have left a suspicion in my mind as to whether the complainant had any chance whatever against the wealthy zemindar of the place. The learned Magistrate was impressed by an entire absence of motive on the part of the accused and yet the same Magistrate records in his judgment that there is a long standing enmity between the petty shopkeepers of Madhuban Bazar and the Madhuban Babus. The question of motive is at all times a difficult matter for speculation, but in this case the finding of the Magistrate itself furnished a strong motive for the act complained against. The learned Magistrate very properly says that there being an old standing enmity between the complainant and the Madhuban Babus, the evidence of the prosecution witnesses must necessarily be received with caution. I agree with this and I would only add that the Additional Sessions Judge should have proceeded with the same caution in considering whether in this case, having regard to the admitted enmity between the parties, the statutory bar imposed by S. 195 should be removed.

The whole prosecution case, however, rested on a very slender point, namely whether the complainant had produced his books of account before the police immediately after the alleged occurrence. As to this the prosecution case was that the complainant showed his account book to the junior Sub-Inspector who took away the book with him. With

reference to this the learned Magistrate who tried the case says this:

"The fact that witness Nabijan Chowkidar has said in his evidence that he (that is to say the junior Sub-Inspector) carried a khata and some paper to the thana after the close of the investigation on the day of occurrence, combined with the somewhat unusual manner suggestive of interpolation in which the nonproduction of the current account book is recorded on p. 11 of the Case Diary, has given reason to suspect the veracity of the junior Sub-Inspector,"

and then by a curious piece of reasoning he comes to the conclusion that the account book was not in fact produced before the police. With reference to the junior Sub-Inspector, the learned Magistrate in another place says:

"The conduct of the police in this case has come in for a good deal of comment and it has been repeatedly insinuated that the police have been conniving at the conduct of the accused from the beginning and that the report and Case Diary prepared by them are absolutely unreliable. There might be some apparent reason for such insinuation so far as certain acts of the junior Sub-Inspector are concerned, e. g., delay in despatching the Case Diary, writing above the printed head-line on p. 11 regarding the nonproduction of the current account which gives rise to suspicion as being an interpolation and which really led the subdivisional officer to order the trial of the accused."

It is also to be noted that the Subdivisional officer held a local inquiry into the matter and he expressed his deliberate conviction that the account book was actually produced and was taken away by the police officer. He says in his report that the entire bazar appeared to be almost deserted and that the bazar people were afraid to tell the truth and did not want to come forward.

A perusal of the record of the criminal case has convinced me that in the unequal contest between a petty shopkeeper and the Madhuban Babus the latter had all their own way. I am unable to hold that there was no foundation whatever for the criminal case instituted by the complainant and I think that this matter should have been taken into consideration by the learned Additional Sessions Judge in granting sanction for the prosecution of the petitioner. In the next place, the Additional Sessions Judge does not exclude the possibility of a personal spite on the part of the Madhuban Babus. With reference to this he makes the following extraordinary observation:

"In such a circumstance I think it would be serving a public interest that the matter should

be thrashed out, and if the appellant be found guilty he may be punished so that such things may not occur in future. And if he be found innocent the Babus' men will take a lesson so as never more to assume an air of injured innocence. Under these circumstances I think the sanction granted by the learned District Magistrate should stand."

I am clearly of opinion that sanction should not be so light-heartedly given in order to enable the parties to have a trial of strength. I do not think that the liberty of any person should by any act of the Court be jeopardized so that the person who asks for sanction "may take a lesson." In my opinion the learned Additional Sessions Judge has failed to exercise his discretion as it should have been exercised, and I would therefore revoke the sanction granted by him and by the District Magistrate and direct that no further proceedings be taken in the matter.

V.S./R.K.

Sanction revoked.

A. I. R. 1919 Patna 365

CHAPMAN AND ATKINSON, JJ.

Rakhal Chandra Digar and another—
Judgment-debtors—Appellants.

v.

*Sidhi Nath Singh and others—*Decree-holders—Respondents.

Misc. Civil Appeal No. 161 of 1917, Decided on 6th February 1918, against order of Dist. Judge, Manbhum, D/- 24th March 1917.

(a) Civil P. C. (5 of 1908), O. 34, R. 6—Mortgage decree providing for personal decree against other properties on price of mortgaged properties being found insufficient is not proper.

A decree in a mortgage suit which provides that in the event of the mortgaged properties fetching a price insufficient to meet the mortgage-debt, there shall be a personal decree against the other properties of the mortgagor, is not a mortgage-decree in the strict sense of the term. [P 336 C 2]

(b) Transfer of Property Act (4 of 1882), S. 58—Mortgage found invalid—Money can be recovered from other properties provided there is no stipulation that debt will be payable from mortgaged properties alone—Civil P. C. O. 34, R. 6.

If a mortgagee brings a suit upon his mortgage bond and it is found that the mortgage is invalid, the mortgagee can realize his dues from other properties of the mortgagor, unless there is an express stipulation in the bond that the mortgage debt is to be realized from the mortgaged properties alone. [P 336 C 2]

*B. Basu—*for Appellants.

*Sidhir Kumar Mitra—*for Respdts.

Chapman, J.—In this case the mortgagee, in September 1910, obtained a de-

cree in a suit brought by him upon his mortgage bond. The decree was in the terms of the compromise, which was to the effect that the amount agreed upon should be recovered from the mortgaged properties and that if that should prove insufficient, the balance should be recovered from the other properties of the mortgagor. Upon the mortgaged properties being brought to sale, it was found that the mortgage was void under S. 46, Chota Nagpur Tenancy Act of 1908, which provides that no transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period which exceeds or might in any possible event exceed five years shall be valid to any extent. The two lower Courts have agreed that the mortgage was invalid by reason of the provisions of this Act. The decree-holder then filed a petition asking for an order that the other properties of the judgment debtor should be put up to sale in accordance with the compromise above referred to. To this the judgment-debtor objected on two grounds: firstly, on the ground that the other properties could not be brought to sale unless there was a second decree directing that sale; and, secondly, on the ground that it was not open to the decree-holder to proceed against these properties in execution of his decree, but that in order to do so he must bring a suit upon a personal covenant contained in the mortgage bond. These objections have been overruled by both the lower Courts and the case now comes before us in second appeal.

Of the cases cited before us there are only two directly bearing upon this point, viz. the case of *Piribhu Narain Singh v. Baldeo Misra* (1) and the case reported as *Behari Lal v. Bashesar Dayal* (2), where it was held that if the mortgaged property cannot be sold in execution of a mortgage decree, no decree under S. 90, T. P. Act, can be granted. Both these cases were decided by learned Judges sitting alone; and the former case appears to have been dissented from in a later decision reported as *Piribhu Narain Singh v. Amir Singh* (3). The law on this subject has been discussed at length in the case of *Javerbhai Jorabhai v. Gordhan*

Narsi (4). There can be no doubt that at any time, up to the sale of the mortgaged property, the mortgagee can abandon his claim against the mortgaged property and ask for a personal decree and bring to sale the other properties of the mortgagor without first bringing to sale the mortgaged properties. It is quite clear that if the mortgagee brings a suit upon his mortgage bond and it is found that the mortgage is invalid, it would be most inequitable to allow the mortgagor to defeat the claim of the mortgagee and to deprive him of money which is obviously due to him under a personal covenant to pay, and that the mortgagee should be prevented from realizing his dues, unless there is an express stipulation in the bond that the mortgage-debt is to be realized from the mortgaged properties and from the mortgaged properties alone.

It is quite clear that there was no such stipulation in the present case. In fact there is a clear provision in the compromise decree that in the event of the mortgaged properties fetching a price insufficient to cover the mortgage debt there must be a personal decree against the other properties of the mortgagor. It has been argued that this was a mortgage decree and can only be executed as such. The fact is that it is not a mortgage decree in the strict sense of the term, inasmuch as it contains a direction that the other properties of the mortgagor should be proceeded against, and that is not the form of a mortgage decree provided by the Transfer of Property Act. The ordinary procedure is to draw up a personal decree against the mortgagor only in the event of the sale proceeds proving insufficient. In my opinion although the correct procedure would have been to provide in express terms that there was to be a personal decree in the event of the mortgage being found to be invalid, yet I consider that such decrees should not be strictly interpreted in India and that justice should be administered between the parties, provided that neither party suffers by such a course. In my opinion the proper course to adopt in this case is to give the compromise decree a liberal construction. I am of opinion that the decree-holder is entitled to proceed against the other properties of the

(1) [1907] 29 All. 260.

(2) [1912] 14 I. C. 591.

(3) [1907] 29 All. 369.

(4) A. I. R. 1915 Bom. 102=39 Bom. 358=28 I. C. 442.

mortgagor judgment-debtor in the event of the mortgage being found to be invalid. I would dismiss this appeal with costs.

Atkinson, J.—I concur.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 367

ATKINSON AND MANUK, JJ.

Rameshwar Lal Bhagat—Appellant.

v.

Jagadeshwar Dayal Singh and others—Respondents.

Misc. Appeal Nos. 110 and 111 of 1918, Decided on 10th December 1918, from the order of Deputy Collector, Sub-Judge, Palamaw.

(a) Civil P. C. (1908), S. 37 (b)—Court passing decree ceasing to exist—Decree should be executed by Court having jurisdiction to try suit.

Where the Court which passed a decree has ceased to exist, the decree should be executed by the Court which would have jurisdiction to try the suit in which the decree was passed.

[P 368 C 1]

(b) Civil P. C. (1908), S. 37 (b)—Independent Courts with concurrent jurisdiction within same territorial limits—Either of Courts can execute decree of the other.

Where there are in fact two independent Courts within the same territorial limits having concurrent jurisdiction, then it is open to either of such Courts to execute the decree of the other.

[P 368 C 1; P 369 C 1]

Atul Krishna Rai and Jamini Mohan Mukherjee—for Appellant.

R. L. Dutt and Mirtunjoy Lal—for Respondents.

Atkinson, J.—These two miscellaneous appeals, namely Nos. 110 and 111 of 1918, are appeals by the plaintiff, decree-holder, from an order of the Deputy Collector, Subordinate Judge of the district of Palamaw made by that officer on 13th February 1918 refusing to execute decrees pronounced in favour of the appellant on appeal to this Court. The facts may be shortly stated: The appellant in the year 1913 sued the defendants in the Court of the Deputy Commissioner of Daltongunj in the district of Palamaw. Two suits were filed: one was Suit No. 5 of 1913 and the other was Suit No. 6 of 1913. Original Suit No. 5 of 1913 became on appeal to the High Court Appeal No. 527 of 1915; and Original Suit No. 6 of 1913 on appeal to the High Court became Appeal No. 538 of 1915, *Rameshwar Lal Bhagat v. Raj Kumar Girwar Prasad Singh* (1). The cases were originally transferred by the Judi-

(1) [1918] 45 I. C. 888.

cial Commissioner of Chota Nagpur to the file of a person bearing the designation of the Special Subordinate Judge of Palamaw District. This learned Judge tried both cases and dismissed the respective suits instituted by the plaintiff-appellant. From that order of dismissal the plaintiff appealed to the High Court; the appeals were heard by this Court in August 1917; and the High Court by its order dated 14th August 1917 reversed the order of dismissal by the Special Subordinate Judge of Palamaw; and by their order declared that the plaintiffs were entitled to recover possession of the lands in suit together with the mesne profits.

The plaintiff-appellant applied to the Court of the Deputy Commissioner of Palamaw, or rather to his deputy who bears now the designation Deputy Collector Subordinate Judge Palamaw, for the execution of both decrees pronounced by the High Court on 14th August 1917. The decrees obtained by the plaintiff, in pursuance of the order of the High Court, were presented for execution to the Deputy Collector Subordinate Judge, and he made an order, which is the order now appealed from, dated 13th February 1918, rejecting the plaintiff's petition for leave to issue execution on the ground that it was not in his Court, viz., the Court of the Deputy Collector Subordinate Judge that the decrees in question were obtained, and that the proper person to execute the decrees passed in obedience to the order of the High Court was the Court of the Special Subordinate Judge who originally tried the suits; and in support of his ruling the learned Deputy Collector relies upon the provisions of S. 38, Civil P. C. That section provides that a decree may be executed by either the Court which passed the decree, or by the Court to which it is sent for execution. The interpretation which the Deputy Collector Subordinate Judge seeks to put upon this section is that he has no jurisdiction to execute the decrees which the plaintiff petitioned for leave to execute; as the suits were not tried or the decrees passed by him, and that the proper Court to execute the decrees is the Court of the Special Subordinate Judge of Palamaw, Ranchi and Hazaribagh.

It has been contended before us that, if a Court in the year 1913 existed in the Palamaw District distinct from the

Court whose inherent jurisdiction was vested in the Deputy Commissioner of Palamaw and such Court was presided over by the Special Subordinate Judge, that then such Court has by virtue of the new method of procedure recently adopted by the High Court with the sanction of Government, ceased to exist; and that thus the application was sustainable in the form presented by the appellants by their petition in November 1917, under the provisions of S. 37, Civil P. C. Cl. (b) of S. 37, provides that

"where the Court of first instance has ceased to exist or to have jurisdiction to execute it (viz. the decree) the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit."

Thus Mr. Atul Krishna Rai on behalf of the appellant contends that inasmuch as the Court of the Special Subordinate Judge, if it existed as an independent Court, apart from the jurisdiction of the permanent Court of the Deputy Commissioner, has now ceased to exist; and that the decrees, the subject-matter of this application, can be executed by the Deputy Collector Subordinate Judge of Palamaw because his Court would have had jurisdiction to try the original suits which were filed in 1913 in the Court of the Deputy Commissioner. We think that this argument is well founded. On the assumption that the Court presided over by the Special Subordinate Judge was in fact at the time the decree was pronounced existent in Palamaw and that such Court had an independent jurisdiction of its own, such jurisdiction has ceased. Matters appear to have changed considerably in recent times; and the whole system of legal procedure and administration applicable to the districts of Palamaw, Ranchi and Hazaribagh has been recast after careful consideration by the High Court with the sanction of Government. In our view the Court of the Special Subordinate Judge, if it ever did exist as an independent Court, has ceased to exist; and that in its place the person appointed as Additional Subordinate Judge for the three districts of Ranchi, Hazaribagh and Palamaw is appointed only to act as an Additional Judge for each such district as an Additional Assistant Judge in aid of and for the more efficient administration

of justice in the permanent Courts exercising territorial jurisdiction within the local limits of their own respective areas or districts.

If this view be correct, then there is now only one Court in existence that could execute the decrees in question and that is the Court now presided over by the Deputy Collector Subordinate Judge of Palamaw, whose office was first created on 13th November 1916 by notification published in the Gazette. Mr. Banerji, who first filled the office of Deputy Collector Subordinate Judge, was appointed in 1916 and his appointment was made in pursuance of the arrangement arrived at between the Government on the one hand and the High Court on the other. The Deputy Commissioner was left free to discharge the onerous duties of his office other than judicial duties, and in his place the Deputy Collector was endowed with the title of Subordinate Judge and vested with the powers of a Sub-Judge for the disposal of the noncontentious work of the Deputy Commissioner's Court with power to execute all decrees; and to assist in the discharge of the administration of justice an additional Judge was appointed to act in the three districts named, and by whom the contentious work of each of such Courts was to be done. Thus the Courts of the Deputy Collector Subordinate Judge and the Additional Subordinate Judge are one and the same Court presided over by different persons. Therefore we think that the point urged by Mr. Rai is well founded and that the applications for leave to issue execution were properly presented to the Deputy Collector Subordinate Judge for execution, and that he should have executed the decrees which formed the subject-matter of the petitions filed before him.

Even if the aforesaid contention be not well founded, and if in fact, as argued by Mr. R. L. Dutt, there are two Courts each possessing concurrent jurisdiction within the District of Palamaw, viz. the Court of the Deputy Commissioner presided over by the Deputy Collector Subordinate Judge, and the other Court presided over by the Special Subordinate Judge, that they were both exercising concurrent jurisdiction within the same territorial limits; and as there was no express distribution of legal business assigned by the Judicial Commissioner

for specific disposal as between the two Courts for independent areas, then it was open to either of such Courts to execute the decree of the other. Authority is to be found in the case reported as *Chaturbhuj Marwari v. Walker* (2) for this proposition and in which it was laid down that :

"where no order has been made by a District Judge assigning to each of two or more Subordinate Judges having the same local jurisdiction the particular business to be done by each, the Subordinate Judge must be taken to have concurrent jurisdiction."

The facts of that case resemble in their main essential features the facts of the present case; and if the argument of Mr. Dutt is well founded, that there are in fact two independent Courts within the same territorial limits having concurrent jurisdiction, then it is open to either of such Courts to execute the decree of the other. Thus for this reason also it would appear that the order of the Deputy Collector-Subordinate Judge impugned is erroneous and that the appellants are entitled to have their decrees executed by him. Accordingly we think that the order of the Deputy Collector-Subordinate Judge was wrong; and these appeals must be allowed, and the case must be remanded to the Deputy Collector-Subordinate Judge with our direction that he duly proceed forthwith upon the petition of the appellant and execute the decrees directed in pursuance of the order of the High Court in accordance with law. Under the circumstances we will not award to either party the costs of this application.

Manuk, J.—I agree.

V.S./R.K.

Case remanded.

(2) [1909] 4 I. C. 510.

A. I. R. 1919 Patna 369

ATKINSON AND JWALA PRASAD, JJ.

Ramendra Nath—Petitioner—Appellant.

v.

Mt. Hikait Kuer—Opposite Party—Respondent.

Misc. Appeal No. 19 of 1919 and Civil Revns. Nos. 211 and 212 of 1918, Decided on 9th May 1919, against order of Sub.-Judge, Saran.

Civil P. C. (5 of 1908), O. 21, Rr. 85 and 86—Provisions are mandatory—Decree-holder auction purchaser failing to deposit balance after deducting amount of decree—Property is liable to be resold.

The provisions of Rr. 85 and 86, O. 21, Civil

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P. C., are mandatory. These rules impose an obligation upon a decree-holder purchaser to bring into Court whatever balance may be due on foot of the purchase-money, after deducting the amount of the decree. If the decree-holder fails to comply with the rules, the property is liable to be resold. [P 370 C 2 P 371 C 1]

Sushil Madho Mullick, Baikuntha Nath Mittra and Panchanan Banerjee—for Appellant.

Judgment.—Three applications have been presented to us on behalf of the judgment-debtor, viz. Miscellaneous Appeal No. 19 of 1919 coupled with Civil Revision No. 211 of 1918 and Civil Revision No. 212 of 1918. The questions which await our determination are covered by Miscellaneous Appeal No. 19 of 1919 and Civil Revision No. 212 of 1918. The respondent in this appeal is a decree-holder who obtained a decree on foot of a mortgage bond, dated 20th January 1899, for a sum of Rs. 3,100. Many attempts have been made to execute this decree from time to time, but unhappily they have all been rendered abortive for one reason or another. The present application for leave to issue execution is dated 17th January 1911, now eight years ago. The sale that is now impeached by these proceedings took place so far back as 14th April 1913, and various applications were made to set aside that sale. The matter proceeded to the Calcutta High Court and eventually came before this Court and our learned brothers Chapman and Roe, JJ., held that no appeal lay to the High Court and that an appeal should be presented before the District Judge to whom only an appeal lay. The learned Judge in one proceeding dismissed the appeal that came before him on 25th March 1918. The learned Subordinate Judge in another proceeding refused to set aside the sale by his order dated 28th June 1913.

Now Miscellaneous Appeal No. 19 comprises two matters: one a proceeding under S. 47, Civil P. C., for the purpose of setting aside the sale on the ground of non-observance by the decree holder auction-purchaser of the provisions of O. 21, Rr. 85 and 86, and also dealing with an application under O. 47, R. 1, for review of a prior order of the learned Subordinate Judge. The property was valued at Rs. 30,000 by the Subordinate Judge but was sold to the decree-holder as the only bidder for a sum of Rs. 8,000.

Apart from this double-barrelled application under S. 47, Civil P. C., and under O. 47, R. 1, Civil P. C., there was also an independent proceeding under O. 21, R. 90, seeking to set aside the sale on the ground of irregularity and fraud. Fraud was not specifically alleged but irregularity in the conduct of the sale was relied on to justify setting aside the sale. The irregularity complained of was referable to the nonservice of the notice of the sale proclamation. The learned Judge in dealing with this matter held that the notice of sale proclamation had not been served and though the nonservice of the sale proclamation was an irregularity that nevertheless the judgment-debtor had not suffered any substantial damage or injury by reason of such irregularity. The reasoning of the learned District Judge in this aspect of the case is far from clear, and his conclusion of fact appears to be based on surmise rather than on proofs.

The learned District Judge appears to have failed to consider the question of impeaching the sale on the ground alleged by the judgment-debtor in Miscellaneous Appeal No. 19 of 1919 relative to the non-observance of Rr. 85 and 86, O. 21. The District Judge thought that inasmuch as an appeal was taken from his decision in the proceeding under O. 21, R. 92, that it would be open to the High Court in that appeal to consider as an additional ground for impeaching the sale the non observance by the auction-purchaser of the provisions of Rr. 85 and 86, O. 21. That portion of the application in Miscellaneous Appeal No. 19 of 1919 which dealt with the review application of the Subordinate Judge's order under O. 47, R. 1, it is not material to consider, and Mr. Mullick I think concedes this.

However the learned vakil's two main points are that the learned Judge in Civil Revision No. 212 of 1918 acted without or failed to exercise a jurisdiction vested in him in not setting aside the sale on the ground of irregularity, and he alleges that on the face of the proceedings the property was sold at a gross undervalue to the decree-holder; that there was no proper bidding; and that obviously, having regard to the value of the property and the price offered by the decree-holder, there was substantial injury to the judgment-

debtor. The learned Judge assigns certain reasons for holding that the judgment-debtor cannot be considered as a person who has sustained substantial injury inasmuch as he and the decree holder have deliberately set themselves to make war one against the other and to use every means in their power to defeat the execution which the decree holder seeks to enforce. The reasons are more in the nature of surmises than conclusions of fact founded upon legal proof and appear to us unsatisfactory; and in our opinion the order of the District Judge refusing to set aside the sale on the application presented to him under O. 21, R. 90, Civil P. C., should be set aside. However apart from the application instituted under O. 21, R. 90, we think that the sale must also be set aside on a ground that was not considered by the learned District Judge, namely, the ground that the decree-holder auction-purchaser failed to comply with the provisions of O. 21, R. 85, read in conjunction with R. 86. R. 85 provides that the purchaser shall bring into Court the amount of his purchase money within 15 days of the date of sale. Now admittedly in this case the purchase price bid for the property sold was the sum of Rs. 8,000 and it is apparent that there would be a residue in favour of the judgment-debtor to the extent of Rs. 2,000, if the true value of the mortgage decree be Rs. 6,000 odd as alleged. It is right to mention that in the execution petition the decree-holder specified that the amount due on the foot of the mortgage decree was the sum of Rs. 15,726.

This estimation of the amount due on the mortgage decree was obviously incorrect. If the true rate of interest be calculated upon the decree, the actual amount due to the decree-holder would be Rs. 6,728. Thus if the purchase price of the property be Rs. 8,000, then there would be a balance of Rs. 1,272 in favour of the judgment-debtor. Therefore clearly the obligation which the Civil Procedure Code imposes upon a decree-holder purchaser is to bring into Court whatever balance may be due on foot of the purchase money, after deducting the amount of the decree. This the decree-holder did not do. R. 86, O. 21 provides a penalty on failure to observe the provisions specified in R. 85. In our opinion the provisions of Rr. 85 and 86,

O. 21 read in conjunction are mandatory. The obligation was clearly upon the decree holder purchaser at the auction sale to bring into Court the balance due on the foot of the purchase price of the property for which he bid and purchased, and having failed to do that the property was liable to be resold, and upon the application of the judgment-debtor under O. 47, R. 1, the Court ought to have considered the judgment-debtor's application and set aside the sale and directed a resale of the property. Accordingly the relief sought in Miscellaneous Appeal No. 19 of 1919 is granted with costs and the sale impeached in the proceeding under S. 47, Civil P. C., is set aside on the grounds stated above. The application in Civil Revision No. 211 of 1918 is disallowed without costs. The application in Civil Revision No. 212 of 1918 is also granted but without costs. The hearing fee in Miscellaneous Appeal No. 19 of 1919 is measured at three gold mohurs.

V.S./R.K.

Order accordingly.

A. I. R. 1919 Patna 371

DAS, J.

Kali Prosad Tewari—Plaintiff—Appellant.

v.

Mahabir Tewari and others—Defendants—Respondents.

Second Appeal No. 1204 of 1917, Decided on 5th May 1919, against decision of Sub Judge, Mozaffarpore.

Landlord and Tenant—Suit for rent dismissed for want of relationship of landlord and tenant—Subsequent suit for ejectment is competent—Civil P. C., S. 11.

Where in a suit for ejectment it is found that the land in dispute belongs to the plaintiff and that a previous suit for ejectment was successfully resisted by the defendants on the ground that they were not tenants of the plaintiff, the defendants are not entitled to remain upon the land and the plaintiff is entitled to khas possession.

[P 372 C 2]

Harnarain Prosad—for Appellant.

B. N. Mitter—for Respondents.

Judgment.—This appeal arises out of a suit brought by the appellant for ejectment of the respondents from the property which is the subject matter of dispute between them. In 1910 the present appellant brought a rent suit against the defendants, which suit the defendants resisted on the ground that there was no relationship of landlord and tenant bet-

ween them. The Court gave effect to the defendants' plea and dismissed the plaintiff's suit for rent. Thereupon the appellant has brought his present suit for ejectment of the defendants, his ground being that the tenants having taken the plea that there was no relationship of landlord and tenant between them and him and that plea having been given effect to by a Court of competent jurisdiction, he is now entitled to ask the Court to eject the defendants. The lower appellate Court has come to the conclusion, firstly, that the disputed land lies within the zamindari of the plaintiff; secondly, that there was a previous rent suit between the plaintiff and the defendants in which the defendants successfully pleaded that they were not the tenants of the plaintiff. But the lower appellate Court dismissed the plaintiff's suit mainly, as I understand the judgment, on two grounds: firstly, because it was not shown that the plaintiff inducted the defendants on the land and secondly, because it was not shown that the consent decree by which the plaintiff established his title to the land was not passed in the presence of the defendants.

In my view the circumstances relied upon by the lower appellate Court do not help the respondents, because it does not matter whether the respondents were parties to the consent decree or not so long as the plaintiff has established his title to the land. The appellant, having established his title to the land, was entitled to rent from the respondents if they desired to stay on the land. They cannot obviously stay on the land and yet refuse to pay rent to the appellant. Secondly, it is no doubt true that the appellant did not induct the respondents on the land, but I do not see how that affects the question whether the appellant as landlord is now entitled to eject the respondents who have successfully established in a Court of law that they are not tenants of the appellant. The learned vakil for the appellant relied upon two cases reported as *Nilmadhab Bose v. Ananta Ram Bagdi* (1) and *Fayz Dhali v. Aftabuddin Sirdar* (2). These cases establish that the rule that a denial of the relationship of landlord and tenant does not entail a forfeiture and does not apply where that denial is given effect to by a decree of a Court. It having been found

(1) [1898] 2 C. W. N. 755.

(2) [1902] 6 C. W. N. 575.

in this case that the land belonged to the plaintiff, and it having been found in the previous suit that the defendants are not their tenants, the defendants have no right to remain upon the land and the plaintiff is entitled to khas possession. The learned vakil for the respondents relies upon a case decided by Mookerjee, J., and reported as *Mallika Dasi v. Makham Lal Chowdhury* (3). On the facts that case is clearly distinguishable from the present case, because in the case before his Lordship Mookerjee, J., there was no denial of the entire title of the plaintiffs or their predecessor in interest.

The objection which was successfully maintained was that the plaintiffs alone were not entitled to realize the whole rent, and their claim was dismissed, not because they had no title to any portion of the rent, but because their right to collect any share of it separately from their alleged cosharers was not established. In this case the denial was of the entire title of the plaintiff and therefore the decision of Mookerjee, J., reported as *Mallika Dasi v. Makham Lal Chowdhury* (3) does not apply to the facts of this case. But Mookerjee, J. does say this: "But in our opinion the decision in these two cases," referring to the decision in *Nilmadhab Bose v. Ananta Ram Bogdi* (1) and *Fayz Dhali v. Aftabuddin Sirdar* (2):

"is not consistent with the principle deducible from the cases of *Debiruddi v. Abdur Rahim* (4) and *Dhora Kairi v. Ram Jewan Kairi Mahton* (5), in which it was pointed out that there cannot be any eviction from an agricultural holding governed by the Bengal Tenancy Act, on the ground of forfeiture incurred by denial of the landlord's title, inasmuch as such ground is not specified in Ss. 25, 44 and 49 of that Act, which enumerated the grounds of ejectment of occupancy raiyats, non-occupancy raiyats and under-raiyats respectively. To hold that a tenant of any of these three classes may be evicted because by reason of the doctrine of estoppel, he is barred from pleading his tenancy, seems to us to be an application of the doctrine of forfeiture by disclaimer without the formal use of the expression,"

and their Lordships relied upon the case of *Kally Dass Ahiri v. Manmohinee Dassee* (6), a decision of Jenkins, J., reported in *I. L. R.* 24 Cal. 440. So far as the decision of Jenkins, J., is concerned, that learned Judge had an opportunity

of giving expression to his opinion in the much later case of *Ekabar Sheikh v. Hara Bewah* (7). The true principle, as I understand the decision, is laid down in that case where the learned Judges point out that the question is not one of forfeiture, but whether having regard to the previous decision between the parties the tenant can plead his tenancy in the later suit. If by reason of the operation of the principle of *res judicata*, the tenants are unable to plead their tenancy, the question of forfeiture of a tenant under the provisions of the Bengal Tenancy Act does not arise. That is how the late Chief Justice of the Calcutta High Court views the matter and I respectfully follow that decision and the decision in another case reported as *Ramgati Mohurer v. Pran Hari Seal* (8). I hold that the respondents were not entitled to, nor did they in fact, plead any tenancy and the previous decision is *res judicata* between the parties and that therefore the appellant is entitled to a decree for ejectment against the defendants, the question of tenancy not being allowed to be raised. I set aside the judgment and the decree of the lower appellate Court and restore the judgment and the decree of the Court of first instance. The appellant is entitled to his costs throughout.

V.S./R.K.

Appeal accepted.

(7) [1910] 8 I. C. 660.

(8) [1906] 3 C. L. J. 201.

A. I. R. 1919 Patna 372

JWALA PRASAD AND FOSTER, JJ.

Mt. Golab Kuer and another—Petitioners.

v.

Mt. Bibi Saira and others—Opposite Parties.

Civil Revn. No. 216 of 1919, Decided on 21st August 1919, from decision of Sub Judge, Muzafferpore.

(a) Civil P. C. (5 of 1908), O. 9, Rr. 2 and 8—Process fee not paid but defendant applying for time to file his statement—Suit cannot be dismissed under R. 2.

Where a plaintiff has made default in paying the fee for service of a summons on the defendant, but notwithstanding this defendant applies to the Court for time to file written statements the filing of such application amounts to an appearance by the defendant under R. 8, O. 9, Civil P. C., and the Court would not be justified in dismissing the suit under R. 2 of that order.

[P 373 C 1]

(b) Civil P. C. (5 of 1908), S. 115 and O. 9, Rr. 2 and 8—Order under Rr. 2 and 8 when

(3) [1905] 2 C. L. J. 389.

(4) [1890] 17 Cal. 196.

(5) [1893] 20 Cal. 101.

(6) [1897] 24 Cal. 440.

conditions not satisfied is without jurisdiction—Revision lies.

As Rr. 2 and 8, O. 9 of the Code require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order thereunder an order made by a Court where these conditions are not fulfilled is open to revision by the High Court under S. 115. [P 373 C 2]

Rajendra Prasad for Guru Saran Prasad—for Petitioners.

Fakhruddin for Tahir—for Opposite Parties.

Judgment.—This application is directed against the order of the Subordinate Judge, dated 9th May 1919, as being without jurisdiction. The order purports to dismiss Suit No. 31 of 1919 under O. 9, R. 2, Civil P. C., on account of the failure of the plaintiff to pay talbana for service of summons on the defendants and to file copies of the plaint. The applicant contends that they being defendants, had already entered appearance on the said date and the proviso to the said R. 2 bars the passing of the order under R. 2 and that the only order that the Court could pass was one under R. 8, O. 9. The plaint was registered on 12th March 1919 fixing 9th May for settlement of issues. On 9th May, although the talbana was not paid for service of summons upon the defendants, and although no summons was issued, yet two of the defendants, the petitioners in this case, filed an application asking for time to file written statements. The plaintiff did not at all appear or take any steps to prosecute the suit.

It is contended on behalf of the opposite party that the mere filing of the application for time does not amount to an appearance by the defendant under R. 8. This contention cannot find favour with us inasmuch as the appearance for the defendant is sufficient whether it be by the filing of written statements or by a petition to take time to file written statements. The Court could therefore pass an order only under R. 8 and had no jurisdiction to pass an order under R. 2 as against the applicants. No doubt defendant 3, the husband of the plaintiff, did not enter any appearance on 9th May, and it was open to the Court to make an order under R. 2 if any relief was claimed against that defendant. It is next contended that this Court cannot interfere with the aforesaid order, howsoever illegal or irregular, under S. 115, Civil P. C., as no question of jurisdiction is in-

involved. Both Rr. 2 and 8 require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order under those rules, and if those conditions are not fulfilled the Court has no jurisdiction to make an order under R. 2 or R. 8 as the case may be.

The first condition in order to give jurisdiction to make an order under R. 2 is that contained in the proviso that the defendant should never have appeared at all. Thus if the defendant does appear, in spite of nonservice of summons, the Court's jurisdiction to pass an order under R. 2 ceases. If on the other hand the defendant does appear and the Court does not make an order under R. 8, the Court then refuses to exercise the jurisdiction vested in it by O. 9, R. 8. It was held in some of the cases cited in Mullah's Civil Procedure Code that to pass a decree ex parte against a defendant treating the delivery of summons by post to a person who was not shown to have been a defendant as a good service is a material irregularity which affects the exercise of the jurisdiction of the Court and as such is fit to be revised under S. 115, Civil P. C. The contention of the opposite party is therefore overruled and the order of 9th May of the Court below is set aside, and the suit will be dismissed as against defendants 1 and 2 under O. 9, R. 8. The order of this Court dated 6th August 1919 staying Title Suit No. 79 of 1919 in the Court of the Subordinate Judge, first Court, Patna, is hereby withdrawn.

V.S./R.K. *Application accepted.*

A. I. R. 1919 Patna 373

CHAPMAN AND ATKINSON, JJ.

Beni Prasad—Petitioner.

v.

Edal Singh—Opposite Party.

Civil Revn No. 260 of 1917, Decided on 1st February 1918.

Civil P. C. (1908), O. 21, R. 66—No valuation other than one fixed by Court should be inserted in sale proclamation.

The insertion of any valuation in a sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and is therefore wrong. An executing Court should not insert in a sale proclamation the valuation assessed by either the decree holder or the judgment-debtor. [P 374 C 1]

Panchanan Mukerjee and Abani Bhusan Mukerjee—for Petitioner.

Kulwant Sahay and Rai Gurusaran Prasad—for Opposite Party.

Atkinson, J.—This is an application made by the petitioner to set aside an order made by the learned Second Subordinate Judge of Patna on 15th August 1917. It was an order settling a sale proclamation in an execution matter and the ground of objection to the order is that it directed that the sale proclamation should contain two valuations: one assessed by the decree-holder and the other fixed by the Court. It is contended that the order is bad; and reliance is placed on the Full Bench ruling of this Court in *Raghunath Singh v. Hazari Sahu* (1). The ruling in that case is not quite on all fours with the present case, but I think the principle applies, viz., that the insertion of any valuation in the sale proclamation other than the valuation fixed by the Court is calculated to mislead intending bidders and therefore wrong. The learned Subordinate Judge should not insert in sale proclamations the valuations assessed by either the decree-holder or by the judgment-debtor. The learned Judge in allowing in this case the valuation of the decree-holder to be stated in the sale proclamation acted in contravention of the ruling in *Raghunath Singh v. Hazari Sahu* (1).

We do not think it necessary to send the case back to the learned Judge to reopen the question of valuation. We direct that the valuation stated by the decree-holder in the sale proclamation be struck out and let the sale proceed on the valuation already fixed by the learned Court below.

Chapman, J.—I agree.

V.S./R.K. *Application allowed.*

(1) [1917] 37 I. C. 872=2 Pat. L. J. 130.

A. I. R. 1919 Patna 374

MULLICK AND THORNHILL, JJ.

Panchanan Mahto—Appellant.

v.

Kanai Mahto and others—Respondents.

Appeal No. 301 of 1917, Decided on 5th August 1918, from appellate order of J. C., Manbhum, D/- 6th September 1917.

Chota Nagpur Tenancy Act. (6 of 1908), Ss. 212, 14 (b) and 208—Sale in execution of rent decree—Raiyat at fixed rate can deposit decretal amount to set aside sale.

A raiyat at fixed rates is entitled, under S. 212, to deposit the decretal amount and to have set aside a sale held in execution of a decree for rent passed against the tenure-holders. It is im-

material whether the right or interest of the raiyat is liable to annulment under Ss. 14 and 208 of the Act. [P 375 C 1]

Naresh Chandra Sinha—for Appellant.

Rajendra Prasad—for Respondents.

Judgment.—Raja Joyoti Prasad Singh Deo obtained a rent decree against certain tenure-holders. In execution of this decree the tenure or holding known as Mauza Amdiha was put up for sale on 6th July 1914 and purchased by Panchanan Mahto who is the appellant before us. After the purchase application was made by certain parties, who are the present respondents, to be allowed under S. 212, Chota Nagpur Tenancy Act, to deposit the decretal amount and to set aside the sale held in execution of the decree for rent against the tenure-holders. Their application was rejected by the Deputy Collector, but on appeal his decision was reversed by the Judicial Commissioner, who held that the applicants were entitled to proceed under S. 212, Chota Nagpur Tenancy Act, whether they had or had not an interest in the property.

This finding was upheld by a Single Judge of the High Court. In a Letters Patent appeal however a different view was taken and the case was remanded in order that inquiry might be made into the applicants' claim as to whether they held an interest in the property sold under a title lawfully acquired before the sale. Both the lower Courts have found that the respondents held as raiyats at fixed rents. The first Court was of opinion that the right of such tenants does not come within S. 14. Cl. (b), Chota Nagpur Tenancy Act, and as the purchaser might annul all the rights of the respondents the latter were entitled to make a deposit. The lower appellate Court held that having regard to the provisions of the Bengal Rent Recovery Act (8 of 1865) the contingency existed of the purchaser bringing a suit for fair rent and avoiding the incident of fixity of rent attached to the tenancy and that therefore the respondents had an interest which might be affected by the sale and were accordingly entitled to make a deposit and set aside the sale. It is contended on behalf of the appellant that the respondents' interest is not such as could be avoided by the purchaser and

that they have no interest in the property sold that might be affected by the sale.

In our opinion it is immaterial whether the right or interest of the respondents is liable to annulment under Ss. 14 and 208, Chota Nagpur Tenancy Act. The words of S. 212 of the Act are so general that they would seem to entitle a raiyat at fixed rates to make the deposit. It is contended that the section contemplates an interest superior to that of a raiyat, but in the absence of any authority on the point we think we must accept the words of the statute without any limitation or restriction. The appeal therefore must be dismissed with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 375 (1)

MULLICK AND JWALA PRASAD, JJ.
Jadubar Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 154 of 1919, Decided on 12th June 1919, against order of Judicial Commissioner, Chota Nagpur.

(a) Penal Code (1860), S. 147—Common object must be established.

The alleged common object of an assembly which renders it unlawful must be established by evidence; it is not a matter that can be inferred. [P 375 C 2]

(b) Penal Code (1860), S. 147—To sustain convictions, origin of fight must be proved.

In the absence of a clear finding as to how a fight originated, a conviction for rioting cannot be maintained. [P 375 C 2]

S. Sinha and Rajendra Prasad—for Petitioner.

Mullick, J.—The petitioner *Jadubar Singh* has been sentenced to rigorous imprisonment for six months for an offence under S. 147, I. P. C., in respect of a field called *Suarmara*. The petitioner and his cousin *Ram Singh*, are in dispute about this land and it appears that on the day of the occurrence each, with a party numbering seven or eight, went upon the land and a fight took place. The finding in this case is that *Jadubar* was entitled to joint possession with *Ram Singh* in equal proportions and that on the day of the occurrence he went to cut the dried up paddy, which was then upon the land. It is found that both parties had sowed the land jointly, but on account of the dispute the paddy was not watered and that therefore it had become dry and useless. There can be no doubt however that *Jadubar* had a right to cut half that paddy. The police appear to have

sent up both parties for rioting and both parties were convicted by the Magistrate. In regard to *Jadubar's* party the learned Judicial Commissioner finds that though the claim set up in the trial Court to a right to the whole field is false, they had a joint right to cut the paddy. But the learned Judicial Commissioner thinks that, as it was their intention to assert a right to the whole field and to exclude *Ram Singh*, the common object of the assembly was unlawful and that in causing hurt in prosecution of that common object the offence of rioting was committed. Now the finding as to the common object must be supported by evidence. Beyond the defence set up at the trial there appears to be no evidence that the object of *Jadubar's* party in going upon the field was to do more than cut their share of the produce.

It would have been possible from the acts of *Jadubar* and his party, when *Ram Singh's* party arrived, to draw the conclusion that their object was something more than to assert their undoubted title to half the land; but neither the first Court nor the learned Judicial Commissioner has been able to come to any finding as to what took place when *Ram Singh* arrived and who began the fight. If *Ram Singh* began the fight while *Jadubar's* party were peacefully employed, there could clearly be no ground for holding *Jadubar's* party guilty of the offence of rioting. They had a right in that case to use appropriate force for the purpose of repelling the attack; and in the absence of any clear finding as to how the fight originated, it is impossible to support the conviction and sentence. The result is that the conviction and sentence are set aside and the petitioner released from bail.

Jwala Prasad, J.—I agree.

V.S./R.K. *Conviction set aside.*

A. I. R. 1919 Patna 375 (2)

CHAPMAN AND ROE, JJ.

Madhu Padhan—Appellant.

v.

Jagu Jena—Respondent.

Appeal No. 16 of 1917, Decided on 3rd April 1918, from the appellate order of Dist. Judge, Cuttack, D/- 25th August 1917.

Behar and Orissa Tenancy Act (2 of 1913), S. 31 (4)—Occupancy holding—Sale in execution of money decree—Objection rights are not transferable is tenable.

It is open to an occupancy raiyat to object to the sale of his holding in execution of a decree for money, upon the ground that his rights are not transferable without the consent of the landlord. [P 376 C 2]

Punna Chandra Palit—for Appellant.

Sarat Chandra Mukerji—for Respondent.

Judgment.—This is an appeal against an order of the District Judge of Cuttack, dismissing an appeal from an order of the Munsif upholding an objection made by an occupancy raiyat to the sale of his holding in execution of a money decree upon the ground that it was not transferable. Sub-S. (4) S. 31, Orissa Tenancy Act, provides that save in certain cases of private sale, for which express provision is made in the earlier portion of the section, no transfer of an occupancy holding or portion thereof otherwise than by a succession or by sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless and until he has consented thereto. It has been contended before us that the meaning of this subsection is that such transfers shall be valid otherwise than against the landlord. On the other hand, the current of decisions up to the passing of the Orissa Tenancy Act, and thereafter has been uniform, and it was long ago established that an occupancy raiyat can on his behalf object to the sale of his holding in execution of a money decree. It is sufficient to refer to the decision in *MacPherson v. Debi Bhushan Lal* (1). We are not satisfied that the legislature, by the terms of sub-S. (4), S. 31, Orissa Tenancy Act, intended to make a charge in that respect. Our attention has been then invited to the case of *Giridhari Naik v. Kashi Tindi* (2). That was a case in which a decree had been obtained upon a mortgage of the occupancy right. Two considerations arose in that case. The first consideration was that the tenant having previously mortgaged the occupancy right, was estopped from subsequently pleading that the occupancy right is not transferable. The second consideration is with respect to the series of decisions in the Calcutta High Court, in which a sale in execution of a mortgage decree has been held to be

in substance a private sale. We are of opinion that the decision in that case is no authority for holding that an occupancy raiyat cannot object to the sale of his holding in execution of a money decree upon the ground that his rights are not transferable without the consent of the landlord. We are of opinion that the learned District Judge was right, and the appeal is dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 376

ROE AND COUTTS, JJ.

Ugrah Singh—Appellant.

v.

Motihari Co. Ltd.—Respondent.

Civil Revn. No. 87 of 1918, Decided on 29th October 1918, from order of Dist.-Judge, Muzafferpur, D/- 2nd February 1918.

Provincial Small Cause Court Act (9 of 1887), S. 32 (2)—Small Cause Court suit instituted in Court not vested with powers of Small Cause Court should be tried as regular suits.

S. 32 (2) is imperative. Therefore if a suit cognizable by a Small Cause Court is instituted in the Court of a Munsif, who at the time of its institution was not vested with the power of a Small Cause Court, it should be tried as a regular suit and not as a Small Cause Court suit even if after its institution the Munsif is replaced by another who is invested with the powers of a Small Cause Court: 26 I. C. 881; 12 C. W. N. 167 and 26 Mad. 212 (F.B.), *Rel. on.* [P 377 C 1]

Rajendra Prasad and Shambhu Saran—for Appellant.

Siva Narain Bose—for Respondent.

Judgment.—The Motihari Indigo Concern instituted, on 2nd July 1917, 52 suits against various tenants for breach of agreement to grow indigo on three kathas in every bigha for a term of 20 years. These suits were cognizable by a Small Cause Court, but on the date on which they were instituted Mr. Shamsuddin as Munsif of Motihari was not vested with the powers of a Small Cause Court. When Mr. Shamsuddin was transferred Maulvi Amir Hamza became Munsif of Motihari, and this officer had Small Cause Court powers up to Rs. 100. On 28th January Moulvi Amir Hamza held that in view of S. 32, Cl. (2), Provincial Small Cause Courts Act, the suits must be tried as money suits, and by an order dated 18th February 1918, he transferred them to the file of the Additional Munsif. On 23rd February 1918, the plaintiff applied to the District Judge of Muzaffer-

(1) [1917] 2 Pat. L. J. 560=42 I. C. 36.

(2) [1917] 2 Pat. L. J. 476=41 I. C. 128.

pur to transfer under S. 24, Civil P. C. these 52 suits from the Court of the Additional Second Munsif to that of the Munsif Maulvi Amir Hamza and treat them as money suits. The learned Judge on this petition made an order that the suits be transferred to the Court of the Munsif of Motihari to be treated as Small Cause Court suits. These orders were passed upon one petition only, and with that petition the order passed by the learned Munsif in Suit No. 1052 only was filed. We understand that in accordance with the order in Suit No. 1052 the whole of the 52 suits have been transferred to the file of Maulvi Amir Hamza, and that it is his intention to try them all as Small Cause Court suits. We asked therefore to set aside these orders of transfer on the ground that the learned Judge was incompetent to make them, and secondly to direct that the suits be tried as money suits and not as Small Cause Court suits, on the ground the S. 32, Cl. (2), Provincial Small Causes Courts Act is a bar to their trial as Small Cause Court suits. For the opposite party it is urged that the case is indistinguishable from *Uma Charan Sen Gupta v. Chinta Roy* (1). For the applicants our attention is drawn to the decision in *Mahima Chandra Sirdar v. Kali Mandol* (2) and to the Full Bench decision of the Madras High Court in *Hari Kamayya v. Hari Venkayya* (3). We are not prepared to say that this case is distinguishable from *Uma Charan Sen Gupta v. Chinta Roy* (1), but at least we may point out that the question of the effect of S. 32 was not considered by the learned Judge who decided that case. In our view the section is imperative. There was no Small Cause Court existent on the date on which these cases were filed and therefore the procedure to be adopted with regard to them is the procedure of the Civil P. C. and not of the Provincial Small Cause Courts Act. In this view we are supported by the decisions quoted on behalf of the applicants. We have no hesitation in accepting the principle upon which these two cases were decided. We see no reason to interfere with the order transferring the case to the file of Maulvi Amir Hamza. The cases were not Small Cause Court cases

and whatever may be the Judge's power with regard to Small Cause Court suits, he certainly has power to transfer a case from one Munsif to another. The result therefore will be that this application is allowed in part. The case, No. 1052, will be tried by Maulvi Amir Hamza under the Code of Civil Procedure and not under the Small Cause Courts Act. The order transferring the remaining 51 cases made by the learned Judge was entirely incompetent, for there was no properly stamped application before him for the transfer of these 51 cases. We therefore set aside that order also and direct that all the 52 cases be tried in the same manner as Case No. 1052.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 377

MULLICK AND ATKINSON, JJ.

Lakshmimali Jemamani Bahuria—Appellant.

v.

Udit Pratap Singh and another—Respondents.

Appeal No. 2 of 1917, Decided on 20th December 1917, from original decree of Sub-Judge, Sambalpur, D/- 22nd November 1916.

(a) **Hindu Law—Adoption—Datta homam though essential among twice-born castes relaxation is made where son belongs to same gotra.**

Among the twice-born castes of Hindus the datta homam is an essential ceremony for adoption, but for some reason a relaxation has been made in favour of a son belonging to the same gotra. [P 379 C 1]

(b) **Hindu Law — Adoption — Validity—Pollution does not affect validity of adoption where religious rights are not essential.**

Where religious rites are not a necessary requisite for an adoption, their omission cannot affect its validity and therefore the fact of pollution which only affects the degree of merit attached to the religious rites, is also immaterial to the validity of the adoption. [P 379 C 2]

(c) **Hindu Law—Adoption — Khsatriyas—Among Khsatriyas there is no prohibition against adoption of brother's child by reason of pollution before 11th day from birth, nor also before 21st day owing to impurity of child's body.**

There is no prohibition in Hindu law among Khsatriyas against the adoption of a brother's child before the 11th day after birth by reason of the doctrine of pollution, or before the 21st day by reason of the impurity of the body of the child. [P 380 C 2]

M. S. Das and B. N. Das—for Appellants.

J. N. Bose and S. C. Bose—for Respondents.

(1) [1916] 26 I. C. 881.

(2) [1908] 12 C. W. N. 167.

(3) [1903] 26 Mad. 212 (F. B.).

Mullick, J.—This appeal arises out of a suit brought by Sreematy Lakshmimali Jemamani Bahuria, widow of Raghunath Singh, against Abdhut Singh, the brother of her deceased husband, and against Udit Pratap Singh, the infant son of Abdhut Singh, for declaration of title and recovery of possession in respect of a half-share in the properties left by her deceased husband.

It appears that the plaintiff was on bad terms with Raghunath Singh and left his house for that of her own father in 1905, and that she never returned to him between that time and his death which occurred on 22nd August 1914.

On 13th November 1914 defendant 1, Udit Pratap Singh, succeeded through his father in obtaining mutation of his name in the registers of the Collector in respect of Raghunath's half-share in Mauza Tampargarh and other villages on the allegation that he had been adopted by Raghunath on 29th September 1913, six days after his birth, and he took possession of all Raghunath's properties with the exception of Mauza Keshpali. The plaintiff thereupon, on 6th October 1915, instituted the present suit for declaration of her title and possession.

A written statement was filed by both the defendants, admitting that the plaintiff was the wife of Raghunath and contending that her suit should be dismissed on the ground that defendant 1 had been validly adopted by Raghunath according to local and family custom. The learned Subordinate Judge having accepted this contention, the present appeal was filed by the plaintiff on 19th February 1917. Before we proceed to discuss the evidence adduced in the case it is necessary to refer to two points of law which have been urged by the learned vakil for the appellant.

The first point is that the alleged adoption having taken place six days after the birth of defendant 1, the giver and the taker were both under pollution and that under the Hindu law the adoption at that period was wholly illegal. It is urged that the period of pollution was 11 days in the family of the parties to the suit, who being Kshatriyas are members of a twice-born caste. Now this question of pollution is nowhere raised in the pleadings. The plaintiff does not attack the adoption on any legal ground. All that she states in her plaint is that

the adoption did not in fact take place. Naturally therefore the written statement also does not refer to the point but it appears that at the trial an issue was framed as follows :

"Whether defendant 1 was adopted by Raghunath Singh as his son. If so was it valid?"

And that the defendants having admitted the marriage of the plaintiff the burden of proof in respect of this issue was placed on the defendants. The defendants thereupon tendered evidence first and the question of the invalidity of the adoption by reason of the pollution of the family was for the first time raised on 11th November 1916, in the course of the cross-examination of defendant 2. In the judgment of the Subordinate Judge there is no discussion at all on the subject and the probabilities are that the parties did not urge the point before him. The learned Judge was himself a Brahmin and would not have been slow to appreciate the importance of the contention if any serious reliance had been placed upon it. But here in appeal before us the learned vakil for the appellant has made this point his first ground of attack and has addressed us with considerable force and ingenuity upon it. It is admitted by both sides before us that in the caste to which the parties belong the Datta Homam ceremony would have been essential in addition to the acts of giving and taking, if the adoptee who is the son of the adopter's own brother, had not been a member of the same gotra. This is now settled law. In Madras their Lordships of the High Court have held in *Sri Sri Chandramala Patta Mahadevi v. Sri Muktamata Patta Mahadevi* (1) that among the Kshatriyas in the Madras Presidency adoption without religious ceremony is valid and although there was subsequently some divergence of opinion it has been finally settled by their Lordships of the Privy Council that in Southern India among the twice-born castes, where the adoptive father and the son belong to the same gotra, the ceremony of Datta Homam is not necessary to constitute a valid adoption. In Allahabad their Lordships in *Atmaram v. Madho Rao* (2) have held that among the Dakhani Brahmins neither Datta Homam nor any other religious ceremony is required to give validity to the adop-

(1) [1910] 6 Mad. 20.

(2) [1884] 6 All. 276.

tion of a brother's son. So also in *Valubai v. Govind Kashinath* (3) their Lordships of the Bombay High Court have ruled that the giving and taking of the child is sufficient for that purpose in all cases. In the Punjab no religious ceremony is required: vide Tupper's Punjab Customary Law, Vol. 3, p. 82. The same is the case among the Jains: *Lakhmi Chand v. Gatto Bai* (4). In Bengal their Lordships in *Indromani Chowdhurani v. Beharilal Mullick* (5) decided that among castes other than the twice-born no ceremonies in addition to the giving and taking of the child are necessary to constitute a valid adoption.

It appears therefore on a review of all the authorities that there is a general consensus of opinion that among the twice-born the Datta Homam is an essential ceremony but that for some reason a relaxation has been made in favour of a son belonging to the same gotra. It has been contended that on principle, if a religious ceremony is otherwise necessary, the fact that the adoptor and the adoptee belong to the same gotra should make no difference; for there is a change in the state of lineage in both cases. However that may be, we must take it that the law is now settled and that the adoption of defendant 1 did not require the performance of any religious ceremony.

The next question is whether there was any pollution which affects the validity of the adoption. In *Ramalinga Pillai v. Sadasiva Pillai* (6) it was contended before their Lordships that the period of pollution according to the Hindu law was 16 days by reason of a death in the adoptive father's family and no adoption within that period could be valid, but it became unnecessary to decide that point because their Lordships found on evidence that the adoption had taken place after the expiry of the 16 days. In *Indromani Chowdhurani v. Beharilal Mullick* (5) it was held that among Sudras no objection on the ground of pollution can invalidate an adoption, inasmuch as the religious rites are not essential to adoptions in those castes. So also it has been held in *Asita Mohan*

Ghose v. Nirode Mohan Ghose (7) that pollution on account of the birth of a relative among Sudras does not vitiate an adoption; it is only a bar to religious acts and renders religious ceremonies inefficacious. In Madras their Lordships in *Santappayya v. Rangappayya* (8) held that the fact that the adoptive mother was under pollution at the time of adoption was only a bar to the performance of Datta Homan and that if the giving and taking were established, subsequent performance of the Datta Homan validated the adoption. In this connexion the learned author, Mr. Sarkar, in his work on the Hindu Law of Adoption at p. 212, Edn. 2, speaks as follows:

"There is no express rule laid down anywhere but it appears from what is affirmed with respect to other religious rites that the mere fact of any of the parties to an adoption being under pollution cannot invalidate an adoption. For adoption is regarded as an imperative religious duty, and as such may be performed even during pollution, the religious rites being vicariously performed by certain relations of the adopter's with his assent, or by his priest. The conclusion follows by analogy from what Raghunandanu says with respect to the worship of the goddess Durga."

Then again at p. 213:

"Thus it is clear that a ceremonial adoption may likewise be made during pollution, the family priest performing the religious ceremony. Besides, under certain circumstances it appears to be perfectly consistent with the spiritual object of adoption that it should take place during pollution. For instance, suppose a man dies giving permission to his wife to adopt a son. The widow's impurity lasts for a year, but as the existence of a son is absolutely necessary for the salvation of her deceased husband's soul, the sooner it is made the better for his spiritual benefit. Therefore the vicarious performance of the ceremonial portion accords best with the urgent and imperative character of the duty; and there is ample authority for the same."

In a later passage the learned author cites with approval the remark of their Lordships of the Madras High Court in *Ranganayakamma v. Alwar Setti* (9). In our opinion therefore where religious rites are not a necessary requisite as in the case before us, their omission cannot affect the validity of the adoption, and therefore the fact of pollution, which only affects the degree of merit attached to the religious rites, is also immaterial to the validity. But the learned vakil for the appellant endeavours to distinguish the authorities cited above on the ground that, although in those cases it

(3) [1900] 24 Bom. 218.

(4) [1886] 8 All. 319.

(5) [1880] 5 Cal 770=7 I. A. 24=4 Sar. 120 (P. C.).

(6) [1861-63] 9 M. I. A. 506=2 Sar. 51 (P. C.).

(7) [1916] 35 I. C. 127.

(8) [1895] 18 Mad. 397.

(9) [1890] 13 Mad. 214.

was held that adoption being a secular act pollution in the family of the adoptive parent was no bar, nevertheless in the case now before us there is a bar because the pollution arises not from any collateral impurity, but from the fact that the body of the adopted infant was itself impure. He contends that during a prescribed number of days the body of the child was untouchable and that therefore during that period no adoption would be legal. It is unnecessary for us to go into the reason which is the foundation of the rules relating to the various pollutions prescribed by the Sastras. Possibly they were hygienic rules which in course of time became invested with religious sanction; but whatever their origin the question is whether the Hindu law prescribes that the body of an infant is for any period of time untouchable and whether apart from the rule that during the period of pollution religious ceremonies lose their merit there is any doctrine or ordinance which forbids the adoption of an infant during any particular period on the ground that the body is impure. The learned vakil for the appellant relies upon two authorities which do not appear to me to be at all coercive. The first is at p. 344 of an edition of the works of the commentator, Parasara (Unabhisati Sanhita), where it is stated that as regards birth and death the period of pollution varies among different castes that it is liable to reduction by circumstances and acts of piety, and that during these periods gifts, acceptances and Homam are not allowed. It has not been shown however that this prohibition has any reference to an adoption and in my opinion gift and acceptance here relate to the transfer of inanimate objects.

The learned vakil for the appellant next refers to Ch. 5 of Colebrooke's Translation of the Institutes of Manu, which prescribes that he who has touched a Chandala, a woman in her courses, an outcaste for deadly sin, a new-born child, or one who has touched a corpse is made pure by bathing. This text however is clearly inconclusive and does not contain any absolute and unconditional prohibition. It admits of the argument that those who took part in the adoption purified themselves by bathing after the ceremony. Finally, with regard to both these texts there arises

the question of their admission in this appeal. So far as they are authorities on a point of law they are certainly admissible but even then they should have been cited in sufficient time to admit of a reply from the respondents instead of being placed before the Court after the learned vakil for the respondents had concluded his reply; but in so far as the texts are authorities not for any law or custom but a local practice, they can be admissible only as evidence and are open to the objection that the defendants have had no opportunity either of giving rebutting evidence in the trial Court or of showing what is the true construction of the original texts. But in any event taking the texts for what they are worth I am satisfied that there is no prohibition in Hindu law among Kshatriyas against the adoption of a brother's child before the 11th day after birth by reason of the doctrine of pollution or before the 21st day by reason of the impurity of the body of the child.

Nor is the evidence in this case sufficient to establish a custom to this effect having the force of law. Such evidence as there is on these points is therefore valuable only so far as it establishes any family rule short of a custom and affects the question whether the adoption did in fact take place. In other words though the plaintiff has shown no prohibition of law, has she established a family practice which makes it impossible for us to believe the testimony of the witnesses for the defendants? It is necessary therefore to consider the evidence of the practice of the family from this point of view. Now with regard to pollution the position seems to stand thus: the period of impurity is liable to variation and there is no written text prescribing a fixed and uniform practice. So it is that in *Ramalinga Pillai v. Sadasiva Pillai* (6) their Lordships found that the period of pollution by reason of a death in the family of the parties in that suit was 16 days while the text from Parasara to which I have made reference above states that ordinarily it is 12 days among Kshatriyas for deaths and births. The fact appears to be that the rule as to the length of the period is liable to variation and must in the present case be determined upon the evidence adduced by the parties. Now it was elicited in cross-examination from defendant 2 that

Ashouch or period of pollution lasts till the 12th day when all the old cooking vessels are broken and new cooking vessels substituted but he suggests in re-examination that the period is capable of reduction by the performance of Sasti Puja and the ceremony of eating ghee. Bhagirathy Panda the family priest who is the defendants' second witness however states that cooking vessels are changed on the 11th day but that the period of pollution lasts only six days; he also admits that adoption is an auspicious ceremony (Subha Karma) and cannot be performed during the period of pollution. This witness has been attacked by the learned vakil for the appellant and it has been suggested that he was not the family priest but I am satisfied that the attack has failed and that he succeeded one Kunja Hota in the post.

This is all the evidence on the point on the defendant's side. On the other hand the only evidence for the plaintiff is that of her witness 1, her father's first cousin. He states that the period of pollution is 11 days; the ceremony of eating ghee on the sixth day is not practised; and that no "good work" (Suva Karma) can be performed during pollution. The conclusions which seem to me established from the above evidence are that the period of pollution due to the birth of defendant 1 was 11 days but that so far as the act of adoption was concerned there was no bar to its being performed on the 6th day after the performance of Sasti Puja and the ceremony of ghee eating, and that in this case the ceremonies were performed by the priest Bhagirathy Panda. I do not think the denial of plaintiff's father's cousin is sufficient to displace the evidence of defendant 2 and his priest. The evidence is certainly meagre on both sides but such as it is the balance is clearly on the side of the defendants. The learned vakil for the appellant next falls back on the argument that the impurity of the body of the child makes the fact of adoption impossible. On this point too the evidence though meagre favours the defendants more than the plaintiff. The evidence of Bhagirathy Panda the family priest is that the body of the infant is untouchable by the males till the "Anturi" or vessel containing fire is removed from the lying-in-room but that if the ghee eating ceremony is performed the

family is purified. Bhagirathy Panda, D. W. 8, deposes that no male can touch the boy for 21 days except a member of the family in case of necessity. He adds that the period is co-extensive with the removal of the Anturi and the performance of the Sasti Puja. On the other side the only evidence again is that of P. W. 1, who deposes that the new born babe cannot be touched for 21 days but admits that the Anturi is removed on the 7th day.

Upon this evidence my finding is that ordinarily the body of the child is untouchable by the males till the 21st day but that as in the case of pollution the impurity can be removed by the Sasti Puja and the ceremony of the eating of ghee. It may be conceded therefore that the rule both as to pollution for 11 days and the impurity of the child for 21 days makes the adoption in the present case unusual but beyond that one cannot go. In my opinion it is established that the disqualification under both heads was removed by the performance of the Sasti Puja and the ghee eating ceremony on the sixth day. After considering evidence as to the factum of adoption and other matters his Lordship concluded as follows:

Having therefore given the fullest weight to the evidence by the plaintiff I am perfectly satisfied that the adoption set up here was valid and genuine. The appeal therefore will be dismissed with costs.

Atkinson, J.—I concur.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 381

DAS AND ADAMI, JJ.

Iswardas Marwari and others—Plaintiffs—Appellants.

v.

Raghunandan Mahton and others—Defendants—Respondents.

Second Appeal No. 576 of 1918, Decided on 23rd May 1919, against decision of Dist. Judge, Santal Parganas.

(a) Civil P. C. (1908) O. 2, R. 3—Misjoinder of causes of action and parties—Test is whether common question to be tried between parties is disclosed in plaint.

The question of multifariousness can only be decided on an allegation made in the plaint. The real test in determining whether a suit is bad for multifariousness or not is to see whether

there is a common question to be tried between the parties on the facts disclosed in the plaint.

[P 382 C 2]

(b) Civil P. C. (1908), O. 2, R. 3—Suit for recovery of money against several persons alleged to have been benefited by loan—Suit is not bad for multifariousness.

Where a suit was brought for recovery of a sum of money on the basis of two rokka with an allegation that all the defendants were benefited by the loan, although one of the rokka was executed by two and the other by one only of the several defendants :

Held : that the suit was not bad for multifariousness. [P 383 C 1]

Naresh Chandra Sinha and Benarsi Prasad Jhunjunwala—for Appellants.

G. C. Paul and Gajendra Prasad Das—for Respondents.

Das, J.—This appeal comes before us from the judgment of the District Judge of Santal Parganas. The substantial question which we have to determine in this appeal is whether the plaint filed in the suit out of which this appeal arises is bad for multifariousness. Now the suit was brought upon two rokka. The plaintiffs allege, first, that all the defendants are members of a joint Mitakshara Hindu family; secondly, that on 3rd Jeth 1321 F., defendants 1 and 5 for the necessary expenses of the family took a loan of Rs. 200 from the plaintiffs; and thirdly, that on 21st Sawan 1321, they, meaning by that word, as we think the defendants the members of the joint family, took another loan of Rs. 725 from the plaintiffs on another rokka. On these allegations the plaintiffs asked for a decree against all the defendants.

The Court of first instance found that the money borrowed on the first rokka was undoubtedly for the benefit of the whole of the joint family but it also found that the second rokka was executed only by Raghunandan and that it was not shown that the money covered by that rokka was for the benefit of the joint family. In that view, the Court of first instance, after having recorded the evidence in the case, dismissed the plaintiffs' suit on the ground of multifariousness. The plaintiffs appealed, and the lower appellate Court did not consider whether the money borrowed on the second rokka was for the benefit of the joint family or not but, without considering that point, it came to the conclusion that the plaintiffs' suit was clearly bad for multifariousness and in that view dismissed the plaintiffs' appeal.

In our opinion the judgment of the lower appellate Court is wrong and cannot stand. The rule as to multifariousness will be found in O. 2, R. 3. That rule provides that any plaintiffs having causes of action in which they are jointly interested against the same defendants, or the same defendants jointly, may unite such causes of action in the same suit.

Now in this case the plaintiffs do allege in their plaint that they have a cause of action against the defendants jointly. Their case may be true or it may be false, but at any rate, so far as the allegations are concerned, they undoubtedly make a case that they have got a cause of action against all the defendants jointly. No doubt the Court of first instance after a complete investigation has come to the conclusion that the defendants other than Raghunandan are not liable on the second rokka, but in our opinion that finding does not dispose of the question whether the plaint itself is bad for multifariousness. The question was debated in the case of *Ramendra Nath Ray v. Brojendra Nath Dass* (1). That was a case against various defendants and Chitty, J., held that the suit was clearly bad for multifariousness and gave the plaintiff a fortnight's time to elect how he would proceed with the suit and which of the defendants he would retain upon the record. The plaintiff declined to elect and preferred an appeal from the judgment of Chitty, J. That appeal was heard by Woodroffe and Mookerjee, JJ., and they came to the conclusion that the question of the multifariousness could only be decided on the allegation made in the plaint. They point out that the real test in determining whether a suit is bad for multifariousness or not, is to see whether there is a common question to be tried between the parties. Now if it is the plaintiff's case that all the defendants are equally liable on the rokka, then it seems to us that there undoubtedly is a common question to be tried between the parties. If he believed in his case and if he instituted two suits on the two Rokkas, the defendants would be the same in each suit because his case undoubtedly is that they are all liable on the rokka. Mookerjee, J., says at p. 172 (cf 27 C. L. J.) that

(1) [1917] 45 Cal. 111=41 I. C. 944.

"as regards the second test it is clear that if different suits were instituted, at least one common question of fact will arise, namely, the exact nature of the act imputed to Brojendra Nath Das which would have to be investigated presumably on the same evidence separately adduced in the several suits,"

and then he points out that one of the principal tests is to see whether, if different suits were brought by the plaintiff on different causes of action, all the defendants would, on the allegations of the plaintiff, have to be joined as defendants in each suit. If they have to be joined as defendants in each suit on the allegations of the plaintiff, then clearly no question of misjoinder of causes of action can arise. He says that such a question can only arise on the allegations made in the plaint. In my opinion the decision of Woodroffe, J., and Mookerjee, J., is clearly right on principle and we respectfully follow that decision. If the test proposed by the learned Judges is applied here clearly there is a common question to be tried between all the defendants and, if the plaintiffs were driven to bring two different suits on the two rokkas then, on their own allegations, they would still have to implead as defendants the same persons in each suit. We are of opinion that the plaint filed in this case is not bad for multifariousness. We would therefore allow this appeal and remand the case to the lower appellate Court with a direction that that Court should remand it to the Court of first instance for disposal according to law. The appellants are entitled to the costs of this appeal and of the appeal to the lower appellate Court. The costs incurred in the Court of first instance will abide the result and will be disposed of by that Court.

Adami, J.—I agree.

V.S./R.K.

Appeal accepted.

A. I. R. 1919 Patna 383

DAWSON-MILLER, C. J. AND COUTTS, J.
Girwar Prasad Singh—Appellant.

v.

Rameswar Lal Bhagat — Opposite Party.

Privy Council Appeal No. 17 of 1919, Decided on 30th May 1919.

Civil P. C. (1908), Ss. 2 (2), 47 and 109—Order of High Court holding that subordinate Court has jurisdiction to execute decree and directing its execution is not final order nor a decree.

An order of a High Court holding that a sub-

ordinate Court has jurisdiction to execute a decree and directing it to proceed with execution is not a final order in respect of which leave may be obtained to appeal to His Majesty in Council.

[P 383 C 2]

Such an order relates solely to jurisdiction and does not determine a question relating to the execution, discharge or satisfaction of the decree and is not therefore a decree within the meaning of S. 2 (2). [P 383 C 2 P 384 C 1]

S. N. Dutt and Ram Lal Dutt—for Applicant.

Atul Krishna Roy and J. M. Mukharji—for Opposite Party.

Dawson Miller, C. J.—This is an application on behalf of the defendants asking for leave to appeal to His Majesty in Council from an order of this Court made on 10th December 1918: see *Rameswar Lal v. Jagadeshwar Dayal Singh* (1) setting aside an order of the Deputy Magistrate-Subordinate Judge of the district of Palamau refusing to execute decrees pronounced in favour of the plaintiff. The petitioner was one of the defendants in the suit and he now makes this application so far as the order affects the decree to which he was a party. The plaintiff obtained the decrees in question in his favour for possession of two villages with costs and mesne profits to be determined by the Court below. He sought to execute the decrees in the Court of the Deputy Magistrate Subordinate Judge of the district of Palamau. When the matter came before that Judge, he came to the conclusion for reasons which it is unnecessary to state that he had no jurisdiction to hear the case. On appeal this Court took a different view and remanded the case back to the Subordinate Judge to proceed with the execution and it is from that order that the defendant now seeks leave to appeal. The order in question does not appear to us to be a final order and therefore it is not a case in which we have any power to grant leave to appeal to His Majesty in Council. It is contended that this is a case which relates to the execution, discharge or satisfaction of a decree and that therefore it is a decree within S. 47, Civil P. C., and that in any case if it does not come within that section, it is a final order because it finally disposes of the rights or some of the rights of the parties. I am unable to accept that view. It does not seem to me that an order relating solely to jurisdiction determines a question relating to the execution, discharge or satisfaction of

(1) A. I. R. 1919 Pat. 367=49 I. C. 94.

a decree within the meaning of S. 2 of the Code. Nor does it appear to me that the order in itself directing that the Court shall hear and determine the questions in dispute in execution is an order which finally disposes of any of the rights of any of the parties. In these circumstances I think that this application should be rejected.

Coutts, J.—I agree.

V.S./R.K. *Application rejected.*

*** A. I. R. 1919 Patna 384**

ATKINSON, J.

Emperor

v.

Nand Kishore Prasad

Criminal Ref. No. 36 of 1919, Decided on 20th June 1919, by Sessions Judge, Patna, D/- 26th May 1919.

*** Criminal P. C. (1898), S. 403—Accused acquitted on charge of cheating—Subsequent trial of charge of falsification of accounts on same record is not legal—Penal Code (1860), Ss. 420 and 477-A.**

Two persons *AR* and *NK* were convicted, the former under S. 420 and the latter under S. 420/109, Penal Code. They appealed, and *NK* was acquitted. *AR* moved the High Court in revision, which held that the conviction should have been under S. 477 A, Penal Code, and directed the Magistrate to commit the case to the Court of Session under that section. The Magistrate issued a notice to both *AR* and *NK*, requiring their attendance before him to show cause why they should not be committed to the Court of Session. *NK*, protested, relying on the fact that he had been acquitted by the Sessions Judge and that until such acquittal was set aside the Magistrate could not commit him again, on the record of the proceedings as they then stood, to take his trial for an offence under S. 477A, Penal Code. The Magistrate however expressed his intention of committing both accused to the Sessions. *NK* then moved the Sessions Judge to set aside the Magistrate's order in so far as it affected his commitment. The Sessions Judge referred the case to the High Court for directions as to the propriety of the Magistrate's order:

Held: that *NK* could not, so long as his acquittal under S. 420, Penal Code, stood, be properly tried again, upon the record as it then stood, for an offence under S. 477 and that if the Crown wished to proceed against him, they must do so in a proper manner and by a separate proceeding, and not upon the original record.

[P 385 C 2]

Government Advocate — for the Crown.
Manuk and Nageswar Prasad Sahay
—for Opposite Party.

Judgment.—This criminal revision comes before me upon a reference made by the learned Sessions Judge of Patna. It would appear that two persons were charged with an offence under S. 420,

I. P. C. Abdul Rauf was the principal offender; and Nand Kishore was charged with being an abettor, and with having committed an offence under S. 420 read with S. 109, I. P. C. The charge preferred under S. 420 was cognizable and triable by the Deputy Magistrate. The Deputy Magistrate convicted both the accused; and from this conviction there was an appeal to the learned Sessions Judge of Patna. Upon the hearing of the appeal the learned Judge affirmed the conviction as against Abdul Rauf, and acquitted his co-accused Nand Kishore, holding that there was no evidence before him upon which he could properly hold that Nand Kishore aided and abetted Abdul Rauf in committing the act of cheating that was alleged against him by the prosecution. Abdul Rauf maintained assiduously before the learned Sessions Judge that the case against him was one not properly triable under S. 420, I. P. C., but that he should have been charged and tried for an offence under S. 477A, I. P. C. The prosecution contended that the charge preferred against Abdul Rauf under S. 420 was correct in form and should be maintained.

The Crown took no steps whatsoever to impeach the validity of the acquittal of Nand Kishore pronounced by the learned Sessions Judge. Abdul Rauf applied to the High Court against the order of conviction by the learned Sessions Judge of Patna, and contended that his conviction under S. 420, I. P. C., was improper; and that he ought to have been convicted having regard to the facts of the case preferred against him, of an offence under S. 477A, I. P. C. A Division Bench of this Court, presided over by Roe, J. and Jwala Prasad, J., held that the contention of Abdul Rauf was correct and accordingly they set aside the conviction of Abdul Rauf under S. 420, I. P. C., and directed that he should be committed to the Sessions for trial for an offence under S. 477A, I. P. C. Nand Kishore was not represented, nor did he appear on the hearing of the application in revision presented to the High Court by Abdul Rauf. The original case against Abdul Rauf, owing to the order of the High Court, was returned to the Deputy Magistrate for commitment to the Sessions. I should observe that the High Court's judgment and order is absolutely silent with regard to the acquittal of

Nand Kishore. Nor did the High Court take any steps to summon Nand Kishore before it with a view of setting aside the acquittal which had been pronounced in his favour. I therefore take it that the High Court never had present to its mind the case of Nand Kishore. Upon the record of the case being returned to the Deputy Magistrate for commitment, the Deputy Magistrate served notice upon Nand Kishore, dated 1st April 1919, requiring him to show cause why he should not be committed for trial to the Sessions jointly with Abdul Rauf for an offence under S. 477-A, I. P. C. Nand Kishore filed a petition by way of cause, relying strongly on the fact that he had been acquitted by the learned Sessions Judge of the offence preferred against him under S. 420, and that until such acquittal was set aside the Deputy Magistrate could not commit him again on the record of the proceedings, as they then stood, to take his trial for an offence under S. 477, I. P. C.

The Deputy Magistrate, judging from his order, dated 15th April 1919, which was passed after the petitioner's petition of cause was filed, was of opinion that he was bound, having regard to the order of the High Court, to commit not only Abdul Rauf, but also Nand Kishore to the Sessions, to stand their trial for an offence under S. 477-A, without in any way, so far as Nand Kishore was concerned, hearing any additional evidence which would warrant the inference that he was guilty of an offence within the meaning of that section. The learned Deputy Magistrate expresses his intention of committing both the accused to the Sessions to stand their trial for an offence under 477-A, I. P. C., on 15th April 1919. Thereupon Nand Kishore applied to the learned Sessions Judge to set aside the order of the learned Deputy Magistrate in so far as it affected his commitment for an offence under S. 477-A, I. P. C. The learned Judge felt, and I think rightly felt, that so long as the acquittal under S. 420, I. P. C., stood as against Nand Kishore, he could not properly be tried again, upon the record as it then stood, charged with an offence under S. 477, and accordingly the learned Judge referred the case to this Court for directions with regard to the propriety of the order passed by the Deputy Magistrate, dated 15th April

1919. I am satisfied that the Deputy Magistrate was wrong in holding that by virtue of the order made by the High Court he was bound to commit Abdul Rauf and Nand Kishore jointly for having committed an offence under S. 477-A, I. P. C. It may or may not be open to the Crown to proceed against Nand Kishore for an offence under S. 477-A, I. P. C., but if they do so they must do so in a proper manner and by a separate proceeding, and not upon the original record as it at present stands. The Government Advocate virtually admits this contention.

Therefore I intend to set aside the order of the learned Deputy Magistrate in so far as it expresses an intention to commit Nand Kishore to the Sessions to be tried for an offence under S. 477-A read in conjunction with S. 109, I. P. C. Various arguments have been addressed to me as to the right of the Crown to proceed against Nand Kishore independently of the order of this Court made upon the application of Abdul Rauf and notwithstanding his acquittal by the learned Sessions Judge. I do not intend to discuss or consider the arguments addressed to me by the learned Government Advocate. They are in my opinion immaterial for the purpose of determining the short point referred to me by the learned Sessions Judge of Patna. It will be sufficient to consider the elaborate arguments of the learned Government Advocate, should any point arise, at a later stage which may require more properly their consideration. But at present, I am satisfied that it was not the intention of the High Court, nor was it possible for the High Court, to direct a prosecution of Nand Kishore having regard to the acquittal that had been pronounced in his favour, until at least the High Court had heard Nand Kishore in his own defence, and had satisfied itself that he ought to and should be prosecuted for an offence under S. 477-A, I. P. C. Accordingly I hold that the order of the learned Deputy Magistrate, Mr. Sircar, dated 15th April 1919, *qua* Nand Kishore is improper, and that he has no right under the circumstances of this case to commit Nand Kishore for trial for an offence under S. 477-A, I. P. C.

V.S./R.K.

Answer accordingly.

A. I. R. 1919 Patna 386

MULLICK AND JWALA PRASAD, JJ.

Sasthi Kenkar Bandopadhyaya and others
—Appellants.

v.

Man Gobinda Chandra and others—
Respondents.First Appeal No. 177 of 1916, Decided
on 23rd July 1919, from decision of Sub-
Judge, Purulia (Manbhum).**Contract Act (9 of 1872), S. 253 (4)—Suit
for dissolution and accounts—When partner
is liable for damages for negligence stated.**Where in a suit for dissolution of partnership
and for accounts, the defendants are charged
with negligence and contribution is claimed in
respect of losses, if the defendants can show that
they used such skill and judgment as they
possessed in the conduct of the business, they
will not be liable to indemnify the plaintiffs for
the losses. [P 387 C 2]The rule of diligence among partners, in the
absence of any specific agreement, is that they
are not always obliged to use that middle kind
of diligence which prudent men employ in their
own affairs; they are secure if they act in part-
nership affairs as they would do in their own, so
that if a partner fall into error in the manage-
ment from want of a larger share of prudence
and skill than he is truly master of, he is not
liable for the consequences. Good faith is required
in a partner as well as diligence, and if a partner
is guilty of gross negligence, unskillfulness, fraud,
or wanton misconduct in the course of the
partnership business, he is ordinarily responsible
to the other partners for all losses and damages
sustained thereby. [P 387 C 2]*Haribhusan Mukherji, Naresh Chandra
Sinha and Shishir Kumar Mitter*—for
Appellants.*N. C. Roy and Panchanan Banerji*—
for Respondents.**Mullick, J.**—This appeal arises out of
a suit for dissolution of partnership and
for accounts in respect of a business
carried on under the name and style of
the Fatka Coal Company. It is now ad-
mitted that the shares of the various
partners were as follows:Plaintiffs Man Gobinda Chandra and
Indra Narain Chandra—4 annas; defen-
dant 1—2 annas; defendant 2—2 annas;
defendant 3—2 annas; defendant 4—1
anna 8 gandas and 2 karas; defendant 5
—1 anna 8 gandas and 2 karas; defen-
dant 6—18 gandas 3 karas; defendants 7
to 10—18 gandas 3 karas; defendant 11
—1 anna 2 gandas 3 karas; and defen-
dant 13 Fulkumari—3 gandas 3 karas.
It is also now admitted that the busi-
ness began in 1905. The suit was
instituted on 19th July 1911. A preli-
minary decree was made on 9th July
1912 and on 20th July 1912 Babu Ama-resh Chandra Mukherji was appointed
receiver. The receiver submitted his
report on 29th May 1916 and the final
decree was made on 4th August of that
year. The Court found that defendants 1,
4 and 5 were jointly liable to pay
Rs 4,025-14-6 to the plaintiff, Rupees'
2,196-5-9 to defendant 2, Rs. 2,459-14-0
to defendant 3, Rs. 156-4-3 to defendant 6,
Rs. 1,050-7-0 to defendants 7 to 10,
Rs. 1,331-4-6 to defendant 11 and
Rs. 221-14-3 to defendant 13. The in-
dividual liabilities of defendants 1, 4
and 5 were ascertained to be respectively
as follows: Defendant 1—Rs. 6,381-1-9;
defendant 4—Rs. 2,348-2-9; defendant 5
—Rs. 2,712-11-9. Against this decree
the present appeal is preferred by defen-
dants 1, 3, 4 and 5. The plaintiffs allege
that the managing partners of the busi-
ness from its inception in 1905 to March
1910 were defendants 1 and 4, and from
April 1910 to August 1912, when the
receiver took possession, the managing
partner was defendant 3. They charge
these defendants with negligence and
claim contribution in respect of a large
number of items. The first question is
whether defendants 1, 3 and 4 were
managing partners at all. Now it is said
that the managing partners are named in
the partnership deed, but that deed is
not forthcoming. The defendants say
that plaintiff Man Gobinda was managing
partner from 1905 till July 1907 and
that defendants 1 and 4 managed from
August 1907 to April 1910, after which
defendant 3 took charge and managed
the business till the receiver was ap-
pointed.It appears however from the written
statements printed at pp. 4, 5, 7, 9 and
10 of the paper-book that defendants 1
and 4 were the managing partners from
the commencement till March 1910 and
defendant 3 from April 1910 till August
1912. The allegation that the plaintiff
Man Gobinda was the managing partner
at any time has not been made out. But
it is clear that he, from December 1905
down to about the middle of 1906, took a
very active interest in the management
of the colliery. He was actually living
at the colliery and in constant communi-
cation with defendant 4 about various
matters connected with its management.
This is proved by the letters dated 22nd
December 1905 (p. 42 of the paper-book),
28th December 1905 (p. 43), 14th Jan-

uary 1906 (p. 44), 29th Magh 1312 (p. 41), 3rd March 1906 (p. 36), 11th March 1908 (p. 45), 14th March 1906 (p. 41). This is also clear from the letter written on 25th February 1911 by A. K. Bhar, the manager of defendants 1 and 4, in answer to Man Gobinda's request for a list of the debts which were about to become barred. He sent him the list printed at p. 110 of the paper-book and asked him either to institute a suit jointly with the other partners or to execute the necessary power of attorney in favour of some one. Therefore Man Gobinda's present allegation that he was entirely ignorant of what was going on cannot for a moment be accepted, and it has been established he was taking a very keen interest in the management of the colliery during the period when defendants 1, 3 and 4 were the actual managing partners. So much so that on 2nd November 1906 (see letter Ex. 6, p. 113, of the paper-book) defendant 4 was obliged to write to Man Gobinda and complain of his general interference in the management of the business, and in particular of his entering into correspondence with the firm of M. L. Laik and Banerji regarding the price at which coal was to be sold to them by the Fatka Coal Company. I think therefore that the Subordinate Judge was right in accepting the finding of the Commissioner in regard to this part of the case.

It is next necessary to consider to what extent defendants 1, 3 and 4 are liable to contribute for losses. The learned vakil for the appellants relies upon Cl. 2, S. 253, Contract Act, which enacts that all partners are entitled to share equally in the profits of the partnership business and must contribute equally towards losses sustained by the partnership business. The learned vakil for the respondents, on the other hand, relies upon the proposition that the managing partners were trustees and as such are liable for every loss that has been incurred during their management. The learned vakil also relies upon *Rowe v. Wood* (1), but that case does not carry him very far, because it merely decides that one partner cannot exclude another from an equal management of the concern, that it is the duty of each to keep precise accounts, to have them always ready for

inspection and to keep good faith towards the other. It is said however that the defendants as trustees departed from the strict line of their duty and are therefore liable. If this could be shown they would in my opinion, be liable whether as partners or as trustees, but in my opinion, the evidence falls far short of this. If again it is sought to make them liable on the ground of negligence, then the law is different for trustees and partners. A trustee is bound to use the prudence and skill which an ordinary person would take of his own similar affairs. On the other hand, the rule of diligence, in the absence of any specific agreement on the point among partners, has been laid down in the civil law as follows:

"Partners are not always obliged to use that middle kind of diligence which prudent men employ in their own affairs; they are secure if they act in the partnership affair as they would do in their own; so that if a partner fall into error in the management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences, for the partners are themselves to blame in not making choice of an associate of greater abilities, and can recover only for the consequences of gross faults (Digest 17, 2, 52):"

Good faith is required in a partner as well as diligence, and if a partner is guilty of gross negligence, unskillfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby: *Law v. Law* (2). The rule is really a part of the law of agency and is therefore reproduced under that head in S. 212, Contract Act. If therefore it can be shown that the defendants used such skill and judgment as they possessed, they are not liable to indemnify the plaintiffs for the losses; and I quote below a passage from *Cragg v. Ford* (3), which seems to me to put the law very clearly. In that case the question was whether the defendant was to be charged with the loss which had arisen from delaying the sale of some cotton belonging to the partnership. The defendant was the managing partner and was found to have been the person principally entrusted with the charge of management of the business and the winding up of its affairs. The Vice-Chancellor, Sir J. L. Knight Bruce, observed as follows:

"The plaintiff was I think entitled to have the cotton sold sooner than it was and sold at a time

(1) [1822] 2 J. & W. 553.

(2) [1905] 1 Ch. 140.

(3) [1862] 1 Y. & Coll. C. C. 280.

when the loss would have been wholly or to a great extent obviated. Under the circumstances if it had been established and proved that the defendant had acted fraudulently or had beyond merely refusing to sell so acted as to prevent the plaintiff from selling, it is very possible that I might have acceded to the plaintiff's demand seeking to charge the defendant with the loss; but fraud is out of the question. The defendant, whether wisely or unwisely, yet, as it must, I think be taken, in the honest exercise of his judgment, considered that the sale, which was a matter in which he was interested as well as the plaintiff, ought to be delayed; the plaintiff, for anything that appears, might himself have sold the cotton or have taken measures for its sale or have himself possessed of it."

Bearing these observations in view, I now proceed to take up each item in regard to which the learned vakil for the appellants has addressed us. The finding of the trial Court in respect of the other items of the Commissioner's report has not been challenged or if challenged at the beginning of the learned vakil's address, was eventually accepted on the ground that the items were small and that it was not worthwhile reopening the finding in this Court. As regards defendant 1, item 20. This is a sum of Rs. 722-11-6 charged against defendant 1 alone for coal sold by the Fatka Colliery to the Dhadka Colliery of which defendant 1 was a partner. It is said that the debt has become barred, owing to the negligence of defendant 1, who being a partner in the Dhadka Colliery profited by that negligence. No reason has been given why a suit was not brought in time to recover this debt. The liability to contribute would prima facie fall upon defendants 1 and 4. The Subordinate Judge appears however to have fixed the whole liability upon defendant 1 on the ground that he was a proprietor in the Dhadka Colliery and therefore stood to profit more than defendant 4. He also seems to have been influenced by the consideration that defendant 1 was jointly and severally liable for the whole debt with his co-partners in the Dhadka Colliery. The learned vakil for the respondents supports this view of the case by referring to S. 249, Contract Act. The answer however is that there is no reliable evidence that defendant 1 was in fact a proprietor in the Dhadka Colliery at the time that the debt was incurred. On the contrary the evidence of Debendra Nath Chatterjee at p. 56 of the paper-book shows definitely that defendant 1 was not a partner then. There is also

no evidence to show that the debt was incurred by the Dhadka Colliery for the purpose of the partnership business. Therefore S. 249, Contract Act, will not assist the plaintiffs. But on the charge of negligence I think the plaintiffs ought to succeed. It has not been shown to us that the plaintiffs had any notice of this debt. It was contended by the defendants before the Subordinate Judge that notice was given to the receiver, but of this there is no evidence before us. There being a complete absence of evidence that defendants 1 and 4 exercised their usual skill and prudence, we must hold that defendants 1 and 4 are liable equally.

Items charged against defendants 1 and 5: No. 34, a sum of Rs. 8,345 2-3, and No. 43, a sum of Rs. 588-10-0. The former sum represents money recoverable from the firm of J. L. Banerji and Co., which was subsequently amalgamated with the firm of M. L. Laik and Banerji, and the latter sum represents money due from the firm of M. L. Laik and Banerji. The firm of M. L. Laik and Banerji has gone into liquidation since the amalgamation, and the Fatka Coal Company being creditors should have proved their debt in insolvency. This apparently was not done and defendants 1 and 5 have been made liable, firstly, because there was negligence on their part in recovering the debts, and secondly, because they are two of the partners of the insolvent firm. From a petition dated 4th September 1913 in the High Court of Calcutta printed at p. 114 of the paper-book, it would seem that the insolvents showed a part of the debt in their schedule. After the institution of the present suit the defendants pleaded that the Official Assignee who was representing the insolvent firm should have been made a party and that contention was accepted on 5th March 1912.

It will be remembered that the receiver was appointed in July of that year, and it was open to the plaintiffs to obtain an order from the Court directing the receiver to prove the debts before the Official Assignee. It is idle for the plaintiffs to say that they had no responsibility in the matter. The receiver deposes that he does not remember receiving any notice of the debt, but it is quite clear that the Official Assignee was made a party because he was a debtor

and the plaintiffs had full knowledge of his liability.

Let us next see whether there was gross negligence on the part of defendants 1 and 5. Defendant 5 certainly was never a managing partner and as for defendant 1, although he was a managing partner at a time when a part of these debts was incurred, there is no finding that he did not act in the ordinary course of business and with all the prudence and skill which he possessed. But it is said that it was the duty of defendant 1 to sue J. L. Banerji and Co. and M. L. Laik and Co. before the insolvency. That again depends on evidence. In the present case it has not been shown that defendant 1 had notice of the pending insolvency of M. L. Laik and Banerji. The evidence is that the purchasers were old customers, and I am satisfied that defendant 1 exercised his usual prudence in giving credit to them. That there was bona fides on his part is clear from the following circumstance.

On 25th February 1911 his manager submitted a list of debts about to become barred to plaintiff Man Gobinda. The debt of J. L. Banerji and Co. is item 15 in this list. The last transaction with J. L. Banerji and Co. appears from this list to have taken place in June 1909. It was open therefore to the plaintiff to bring a suit for its realization.

I may also notice that on 10th October 1909 the plaintiff company held a meeting at which the assets and liabilities up to the month of June were examined and the manager was directed to take steps for the realization of the dues and to inform the partners of the final result, and the plaintiff Man Gobinda's son Kunja was directed to sign the daily cash book. The manager, as has already been seen, pressed for the institution of suits, but no action was taken by the partners. In these circumstances neither defendant 1 nor defendant 5 can be held liable on the ground of negligence. The other ground on which it is sought to make defendants 1 and 5 liable is S. 249, Contract Act. That section would, no doubt, be applicable if it could be shown that the debts were incurred in the usual course of business by or on behalf of the partnership. There is a complete absence of evidence on this point and therefore S. 249 would not apply. Therefore the result I arrive at is that the judgment of

the Subordinate Judge in regard to items Nos. 34 and 43 must be set aside. Debts charged against defendants 1 and 4, item No. 28, a sum of Rs. 5,599-12-0, remaining due from one Hari Lal Nagar on account of the price of coal sold to him, and item No. 51, a sum of Rs. 2,005-8-0 due from R. N. Biswas for the same reason.

It is alleged that defendants 1 and 4 have by their negligence allowed these debts to become barred. It appears that the last transaction with Hari Lal Nagar was in February 1909 and the last transaction with Biswas in June 1909, so that the debts did not become barred till after the suit was instituted. The case of the plaintiffs is that there was collusion between defendants 1 and 4 and Hari Lal Nagar, that Biswas was a fictitious person and that the sums alleged to be due from both have been really misappropriated by the defendants. The case of the defendants is that Hari Lal Nagar and Biswas were both old customers and it would have been folly to bring a suit against them till the last moment. With regard to Hari Lal Nagar, it is said that he was a man from Rajputana and that he absconded because owing to a sudden drop in the price of coal his business failed, and that the defendants after due inquiry were totally unable to ascertain his whereabouts between 1909 and 1911. With regard to Biswas they deny that he is a fictitious person. Now the evidence upon which it is argued that Biswas was a fictitious person consists of the testimony of Debendra Nath Chattopadhyaya, witness 2 for the defendants, but that testimony is of the vaguest description. I am not at all satisfied that there is any substance whatever in the allegation that Biswas was not an old and reliable customer to whom the defendants were justified in giving credit.

With regard to Hari Lal Nagar it is established that he was an old customer, but it is said that the defendants should have brought a suit against him and made substituted service under O. 1, R. 8, Civil P. C. It is also contended as regards both Hari Lal Nagar and Biswas that it was the duty of the defendants to bring a suit between 1909 and 1911. I find no evidence of dishonesty or fraud. At most there was an error of judgment and the defendants are, in my opinion,

exempted from liability upon the principle enunciated in *Cragg v. Ford* (3). It is also to be observed that in the list of debts about to become barred at p. 110 of the paper book both these debts appear; also that in the proceedings of the company of October 1909 the accounts up to June 1909 (presumably including these debts) were passed by the company. In my opinion the judgment of the learned Subordinate Judge as regards both these items must be set aside.

Item No. 52.—This was a small sum of Rs. 173-7-3 representing the price of coal purchased by Sachindra Nath Bose, a clerk employed by the company. This clerk fell ill, took leave and died during his leave. The defendants plead that the clerk had due to him some pay and as he was an employee, the net balance due from him was treated as an advance of salary. The managing partners had implied authority to make an advance of this kind, which, in my opinion, was for the benefit of the business. The finding of the Subordinate Judge is therefore in my opinion erroneous and must be set aside. The result therefore is that defendant 1 succeeds as to half of item No. 20 (involving a sum of Rs. 361), half of items Nos. 34 and 43 (involving respectively Rs. 4,172 and Rs. 299), half of items Nos. 28 and 51 (involving respectively Rs. 2,799 and Rs. 1,002). Defendant 4 succeeds as regards half of items Nos. 28 and 51. Defendant 5 succeeds as regards half of items Nos. 34 and 43. The appeal is accordingly decreed to this extent in favour of defendants 1, 4 and 5 respectively. In regard to the rest of the items covered by the appeal which is valued at a total of Rs. 19,171, the appeal fails. The success of defendants 1, 4 and 5 amount to Rs. 16,698, and they will jointly get costs in proportion to this sum and will pay costs in proportion in respect of the balance to the respondents. The costs awarded to defendants 1, 4 and 5 will be shared by them equally.

As regards the lower Court we decline to interfere with the calculation of the costs awarded by that Court. The necessary corrections should therefore be made in col. 4 of the statement submitted by the receiver and printed at p. 105 of the paper-book and a decree prepared accordingly.

Jwala Prasad, J.—I entirely agree.
V.S./R.K. *Appeal allowed.*

A. I. R. 1919 Patna 390

COUTTS AND DAS, JJ.

Nathuni Prasad and others—Plaintiffs
—Appellants.

v.

Anwar Karim and others—Defendants
—Respondents.

Second Appeal No. 373 of 1918, Decided on 31st July 1919, from decision of Dist. Judge, Gaya.

(a) **Transfer of Property Act (4 of 1882), S. 111 (d)**—Merger must be of whole interest to determine a tenancy.

The entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immovable property has determined by merger within the meaning of Cl. (d), S. 111,

[P 391 C 2]

(b) **Bengal Tenancy Act (1885)**—Mukarrari lease is not encumbrance for purpose of Act and Act 11 of 1859 also.

A mukarrari is not an encumbrance at all except for the purposes of the Bengal Land Revenue Sales Act and the Bengal Tenancy Act.

[P 391 C 2]

Rajendra Prasad and Hurnarain Prasad—for Appellants.

Khurshed Husnain, Guru Saran Prasad and Nawal Kishore—for Respondents.

Das, J.—This appeal arises out of a suit brought by the plaintiffs to enforce a mortgage bond executed by one Tabarak Hussain on 2nd November 1904. Tabarak Hussain is now represented in this litigation by defendants 1 to 5. Defendants 6 to 9 are the subsequent purchasers of two annas of the proprietary interest of Tabarak Hussain in the eight annas of Mauza Pardhana; defendant 11 is the mortgagee in respect of a two annas mukarrari interest in the same property. The lower appellate Court has given a modified decree to the plaintiffs, that is to say, it has given them a decree for sale, declaring that the property mentioned in the mortgage bond is to be sold in case of failure to pay, but that the two annas share of defendants 6 to 9 is not to be deemed to be sold in execution of the decree.

The appellants contend that they are entitled, in execution of their mortgage decree, to sell two annas out of the eight annas share belonging to the mortgagor in village Pardhana free from incumbrance, and that to this extent the decree of the lower appellate Court should be reversed. The mortgage bond is perfectly clear on this point. The mortgagor mortgaged his two annas share out of his

eight annas proprietary interest free from mortgage. Defendants 6 to 9 have purchased two annas out of the eight annas share subsequently to the execution of the mortgage, but Mr. Khurshed Hussain, on behalf of the subsequent purchasers, argues before this Court that the mortgagees ought not to throw any portion of the burden on them, and that the equities between the parties can be properly adjusted by allowing the plaintiffs to sell two annas out of the six annas of the proprietary interest of the mortgagor, leaving him two annas free from any encumbrance at all. In this connexion, we are unable to agree. It seems to us that right of the mortgagee is to proceed against any two annas he likes out of the eight annas proprietary share which was of the mortgagor. That is his right under the mortgage and that right has not been taken away by anything that has happened subsequently. Defendants 6 to 9 have purchased the property subsequent to the execution of the mortgage, and they cannot compel the mortgagees to confine themselves to any particular portion of the property. We think therefore that this portion of the decree ought to be reversed.

Another question that has been argued before us by Mr. Rajendra Prasad on behalf of the appellants is that, on a proper construction of the mortgage bond, he has got a mortgage security not only on the two annas share of the proprietary interest of the mortgagor but also on the two annas of the mukarrari share which the mortgagor inherited just before the mortgage. The point arises in this way. The mortgagor, as the proprietor of the eight annas share of the village, granted a mukarrari in 1881 of the entire eight annas in favour of his wife Mt. Kabiran. Now Mt. Kabiran died in 1904, and after her death the mortgagor, as the husband of Mt. Kabiran, inherited two annas out of the eight annas mukarrari interest which was carved out of the proprietary interest in favour of Mt. Kabiran. The mortgage in favour of Mr. Rajendra Prasad's clients was executed subsequent to the date when the mortgagor inherited his two annas share of the mukarrari interest. The first argument advanced by Mr. Rajendra Prasad is that there was a merger of the mukarrari interest in the proprietary interest and therefore there is no mukarrari now subsisting and

that by his purchase he is entitled to get direct possession of the property. It seems to us that there cannot be a merger, because the mortgagor was the proprietor in respect of the eight annas share in the village, whereas he inherited merely a two annas share in the mukarrari. S. 111, Cl. (d), T. P. Act, provides that a lease of immovable property determines, in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right.

It is obvious that the entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immovable property has determined. Now, it is not denied by Mr. Rajendra Prasad that the six annas interest in the mukarrari still vests in persons other than the proprietor. Therefore it seems to us there cannot be a merger in this case. The case of *Amatoo v. Sheik Muksud Ali* (1) is an authority for this proposition. In the next place, it is argued by Mr. Rajendra Prasad that whether there has been a merger or not, the mortgagor undoubtedly intended to give a mortgage in respect not only of his proprietary interest but also in respect of his mukarrari interest, and he relies upon the passage in the mortgage bond, where the mortgagor covenants that his interest is free from encumbrance. Mr. Rajendra Prasad says that a mukarrari is an encumbrance and therefore he has got a mortgage free from the mukarrari interest which was in the mortgagor. It seems to us that a mukarrari is not an encumbrance at all except for the purposes of Act 11 of 1859 (B. C.) and the Bengal Tenancy Act. In our opinion therefore this contention on behalf of the appellants must be overruled. The result therefore is that this appeal succeeds in so far as the plaintiffs will be entitled to a mortgage decree for the amount claimed by them and will be entitled in execution of that mortgage decree to sell two annas out of the eight annas proprietary share of the mortgagor in village Pardhana free from encumbrance. We make no order as to costs in this Court.

Coutts, J.—I agree.

V.S./R.K. *Appeal partly accepted.*

(1) [1915] 28 I. C. 314.

A. I. R. 1919 Patna 392 (1)

ROE AND JWALA PRASAD, JJ.

Baldeo Rai—Appellant.

v.

Ram Ekbal Singh—Respondent.

Appeal No. 779 of 1917, Decided on 11th December 1918, from the appellate decree of Dist. Judge, Shahabad, D/-26th March 1917.

Mesne Profits—Mode of assessment—Costs of cultivation and reaping can be allowed.

In assessing the amount payable by a trespasser on account of mesne profits, the costs of cultivation and reaping should be allowed to him. [P 392 C 1]

Atul Krishna Ray—for Appellant.*Raghunath Singh*—for Respondent.

Judgment.—The appellants in this case are aggrieved by a decree for mesne profits on the basis of the actual productive power of the land without taking into calculation the cost of labour for growing and reaping the crops. It is urged on behalf of the respondents that the view taken by the Allahabad Court has been that where the cultivation of the land has been done by a trespasser he is not entitled to such expenses. This no doubt was the view taken in the Full Bench decision in *Altaf Ali v. Lalji Mal* (1), but even that view has been considerably modified by the decision in *Abdul Ghafur v. Raja Ram* (2). Certainly the Calcutta view has always been that where there has been a trespass no more will be given against the trespasser than what a man of ordinary capacity and diligence would gain from the trespass. In this view it is clear that the costs of cultivation and reaping should have been allowed. We assess these costs at 33 per cent and direct that the decree made by the lower appellate Court be reduced by one-third. The plaintiffs-respondents in the first instance seem to have grossly overvalued their claim. We therefore direct that each party pay his own costs throughout these proceedings.

V.S./R.K.

Decree modified.

(1) [1875-78] 1 All. 518.

(2) [1901] 23 All. 252.

A. I. R. 1919 Patna 392 (2)

ATKINSON, J.

Sheo Barat Singh—Plaintiff—Appellant.

v.

Padarath Mahton and others—Defendants—Respondents.

Second Appeal No. 1330 of 1917, Decided on 25th June 1919, from decision of Dist. Judge, Gaya, D/- 14th June 1917.

Mortgage—Construction—Usufructuary mortgage of zamindari interest—Mortgagee letting out land to third person during currency of mortgage—Suit by mortgagors for declaration that they were entitled to land as their khudkasht and that lessees had not acquired occupancy rights in land—Mortgagee had power to induct tenants—Tenant acquired non-occupancy rights with land subject to mortgage—Suit by mortgagor ought to be instituted within six months after expiration of mortgage or its redemption—Bengal Tenancy Act (1885), Sch. 3, Art. 1, Cl. (a).

In 1893 the plaintiffs mortgaged the zamindari interest in certain lands to defendants 1 to 5. The mortgage was in form a usufructuary mortgage. In 1913 the mortgagors redeemed the mortgage, but during the currency of the mortgage the mortgagees had let the land to defendants 6 and 7. The plaintiffs brought the present suit for a declaration that they were entitled to the land as their khudkasht land, and contended that defendants 1 to 5 had no right or title to settle the land with defendants 6 and 7, who had not acquired occupancy rights in respect of the property and that in fact they were trespassers thereon. In appeal to the High Court the first contention put forward was that the ijara zarpeshgi mortgage did not create as between the mortgagors and mortgagees the relationship of landlord and tenant so as to make defendants 1 to 5 tenants of the plaintiff in the ordinary legal acceptance of the term:

Held: that the mortgage deed in suit did not create the relationship of landlord and tenant between the mortgagors and mortgagees the character of the deed was not a lease but a mortgage. [P 391 C 1,2]

It was next contended that defendants 1 to 5 were mortgagees only and had not the power or right to create an interest affecting the mortgaged premises of longer duration than their own interest in the same:

Held: that defendants 1, to 5 were mortgagees in possession under a usufructuary mortgage of the zamindari right pledged as security for the mortgage debt and that they had the power in law to induct a tenant into the tenanted land subject to such mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant, and that such tenant when inducted by the mortgagees acquired non-occupancy rights in the tenanted land subject to such mortgage as aforesaid: [P 395 C 1,2]

Held: further that the plaintiff's suit was barred by limitation under Art. 1, Cl. (a), Sch. 3, Bengal Tenancy Act. The obligation in law upon the plaintiffs, if he desired to dispossess defendants 6 and 7, was to bring a suit in ejectment to eject them within six months after the

expiration of the mortgage or after the mortgage had been redeemed. [P 395 C 2]

Shib Narayan Bose—for Appellant.

Guru Saran Prosad—for Respondents.

Judgment.—This appeal comes before me from the decision of the District Judge of Gaya, dated 14th June 1917. The plaintiffs seek a declaration that they are entitled to the lands in suit as their khudkasht lands; and they claim that defendants 1 to 5 had no right or title to settle the same with defendants 6 and 7, and they also allege that defendants 6 and 7 have not acquired occupancy rights in respect of the property in suit and that in fact they are trespassers thereon. The plaintiffs on partition became entitled to a 7 dams odd share in Mauza Dihuri Hasanpur situated in the District of Gaya. The interest which the plaintiffs acquired on partition in the aforesaid mauza was the proprietary or zamindari right therein and the share of the plaintiffs is represented by two bighas 18 kathas 17 dhurs of land. The plaintiffs in the year 1893 mortgaged the zamindari interest in the lands in suit to defendants 1—5 to secure a sum of Rs. 450. The mortgage was in form a usufructuary mortgage and the mortgage deed provided that the mortgagees were to be in possession of the mortgaged premises for a period of seven years; that they were to discharge the outgoings and to pay whatever balance was left over out of the yearly rent reserved by the deed itself to the mortgagors. What was in fact mortgaged was the proprietary interest of the plaintiffs in Mauza Dihuri Hasanpur which as I have said, comprised of two bighas 18 kathas 17 dhurs of land. The usufructuary mortgage deed clearly reserved power to the mortgagors to redeem the mortgaged premises by paying up the amount of the mortgage debt even after the term of the mortgage itself had expired. The mortgage would have expired in the year 1900, but in fact the mortgagor did not exercise the right of redemption until the 18th June 1913. Consequently from the year 1893 down to June 1913 the mortgagees have been in possession of the zamindari interest in the lands in suit as usufructuary mortgagees.

The mortgage was redeemed not by a redemption suit but by mutual agreement between the parties. During the currency of the mortgage the mortgagees let the two odd bighas of land above referred to

the zamindari right in which was the security for the amount of the mortgage money advanced, to the defendants 6 and 7. The precise date when the letting was made to defendants 6 and 7 has not been ascertained but it would appear from the judgments of the two lower Courts that defendants 6 and 7 have been in possession of the lands in suit for a very considerable time.

These are the short facts of the case and it is necessary to consider the legal points involved in the light of the legal arguments which have been addressed to me. As I have already pointed out the plaintiff claimed that the lands in suit were his khudhasht lands. Both the lower Courts concur in a finding of fact that the lands in suit were not the khudkasht or bakasht lands of the plaintiff. Consequently, when the mortgage was executed in the year 1893, the inference must be that the lands in suit were then raiyati lands, and that the mortgagees merely secured the proprietary or zamindari interest in the lands as security for their mortgage debt. I gather that subsequent to the creation of the mortgage the raiyati interest, which had been in existence in respect of the 2 bighas odd when the mortgage deed was executed lapsed or expired, for some reason which does not definitely and precisely appear. It may be that the original raiyat of this small miserable holding of two bighas 18 kathas and 17 dhurs abandoned his interest therein, and that thereupon the lands became unoccupied as raiyati lands for the time being; and that defendants 1—5 as mortgagees of the zamindari interest inducted defendants 6 and 7 upon these lands and since which time defendants 6 and 7 have been in possession thereof. Now these defendants 6 and 7, by virtue of the letting made to them by defendants 1 to 5, claim to have acquired if not occupancy rights, at least non-occupancy rights in the lands in suit.

The first contention put forward is that the ijara zarpeshgi mortgage deed did not create as between the mortgagors and the mortgagees the relationship of landlord and tenant; and that in effect it was nothing more than a simple usufructuary mortgage, and did not in law make defendants 1 to 5 tenants of the plaintiff in the ordinary legal acceptation of the term. The learned District Judge in ap-

peal held that the usufructuary mortgage bond had in law the effect of creating defendants 1 to 5 tenants of the lands in dispute to the plaintiffs. In my opinion the learned District Judge was clearly wrong in point of law in arriving at this conclusion, having regard to the decision of this Court in a case reported as *Raj Kumar Thakur Ranjit Narayan Singh v. Motilal Marwari* (1), and in addition there are numerous other authorities to show that a deed of the character of the deed in this case is not a lease but a mortgage; *Vide Nidha Sah v. Murli Dhar* (2). In argument before me the learned vakil appearing on behalf of the respondents admits that the decision of the learned appellate Court that the usufructuary mortgage bond referred to in this suit did in law create a letting as between landlord and tenant in the ordinary acceptation of the term is wrong and cannot be supported. The plaintiff-appellant contends that defendants 1 to 5 were mortgagees only, and that they as mortgagees had not the power or right to create an interest affecting the mortgaged premises of longer duration than their own interest in the same. That being limited owners in effect they could not create a burden or interest affecting the zamindari right which would enure as against the mortgagor after redemption.

This argument at first seemed well founded, but on a closer examination it appears to me to be without foundation. A mortgagee in possession of the property of the mortgagor has clearly defined rights and duties to discharge relative to the mortgaged property pledged as security for the mortgage debt. These rights and obligations are embodied in Ss. 72 to 76, T. P. Act; and one of the obligations imposed upon a mortgagee in possession is that he shall manage the mortgaged property in a prudent way such as an ordinary man would manage his own business. It appears to me reasonable and rational that if a mortgagee while in possession lets a portion of the mortgaged premises which has become vacant or untenanted during the currency of the mortgage security that then clearly it is the mortgagee's duty either to occupy the land himself and cultivate it to the

best advantage or in the alternative as a prudent business man to let such land to a solvent tenant. The law precludes the possibility of the mortgagee allowing the land to remain fallow, and if the mortgagee did allow the land to remain in a wasteful and unprofitable condition so as to be wholly unproductive the law would impose upon the mortgagee liability for gross mismanagement and default. Therefore the position in this case is this: that the mortgagees of the zamindari right and interest in exercise of their statutory duty and obligation created a tenancy or a letting of the lands which formed the subject-matter of their mortgage security to defendants 6 and 7. The question that remains to be considered is what right did defendants 6 and 7 acquire in respect of the letting, which was clearly made to them by the action of the mortgagees in possession of the zamindari interest in the mortgaged property. The case reported as *Atal Chandra Rishi v. Lakhi Narain Ghose* (3) seems to me to indicate very clearly that the tenant to whom the letting was made by the mortgagees was at least a non-occupancy raiyat within the meaning of the Bengal Tenancy Act. Mookerji, J., deals with this aspect of the case at p. 56 (of 10 C. L. J.) of the report, and at p. 57 (of 10 C. L. J.) he says:

"The possession of defendant 4 therefore in its inception was lawful and as he became a raiyat he acquired the rights of at least a non-occupancy raiyat."

The well-known case which is a Full Bench ruling of the Calcutta High Court reported as *Binad Lal v. Kalu Pramanik* (4) seems to me in its reasoning to apply with considerable force to the facts of this case. In the case immediately referred to it was laid down that a trespasser, who believing himself to be the de facto landlord of certain premises, induced a tenant thereon and who made a letting of a certain portion of the premises in the alleged landlord's possession and whom the tenant believed to be the de facto landlord, created *qua* the tenant a tenancy in the lands so let of a non-occupancy character. This Full Bench ruling referred to has been considered in subsequent cases, but it has never been dissented from though the principle underlying it has been made plainer and

(1) [1917] 42 I. C. 803.

(2) [1903] 25 All. 115=30 I. A. 54=8 Sar. 435 (P. C.).

(3) [1909] 2 I. C. 417.

(4) [1898] 20 Cal. 708 (F. B.).

clearer by subsequent decisions. Reading the Full Bench ruling with the later authorities reported as *Upendra Narain Bhattacharya v. Protap Chandra Paradhan* (5), *Krishna Nath Chakravarty v. Muhammad Wafiz* (6) the sum and substance of these authorities amount to this: that where a man believes himself bona fide to be landlord of certain premises, though in law he is not so, and he makes a letting to a person who believes bona fide that such person is the landlord and has power to make such letting that then the interest created by virtue of such letting creates a non-occupancy raiyati interest in favour of the person to whom the letting is made. The only answer urged in reply to this argument is the definition of a raiyat contained in S. 5, sub-S. 3, Ben. Ten. Act. Sub-S. 3 provides that a person shall not be deemed to be a raiyat unless he holds lands either immediately under a proprietor or immediately under a tenure holder, and the argument is that as a mortgagee is neither a proprietor nor a tenure holder, that therefore the person to whom a mortgagee lets lands cannot be said to be raiyat.

Section 60, Ben. Ten. Act, is relied upon for the purposes of showing that that Act contemplates a distinction between a proprietor and a mortgagee. I cannot agree with this argument. It seems to me to be against the entire current of all modern authority; and if it were open to me to hold I would hold that a usufructuary mortgagee of the proprietary interest in landed property is *qua* the occupying tenants on the estate in the position *pro tem* of a proprietor; because the whole legal estate of the proprietor is for the time being during the currency of the mortgage vested in the mortgagee as such and all that the true owner of the estate has is a right in equity to redeem the property, when he himself conceives that he is able to discharge the obligation of paying the mortgage debt. Therefore I hold that in point of law the learned Judge was wrong in deciding that defendants 1-5 were tenants of the plaintiffs. But I hold that they were mortgagees in possession under a usufructuary mortgage of the zamindari right pledged as security for the mortgage debt and that they had power in law to

induct a tenant into the tenanted land subject to such mortgage when the whole or part of such tenanted land became unlet or vacant and without a tenant, and that such tenant when inducted by the mortgagees acquired non-occupancy rights in the tenanted land subject to such mortgage as aforesaid. The question remains to be considered whether the plaintiff's suit is barred by limitation. If I am right in holding that defendants 6 and 7 have acquired non-occupancy rights in the lands in suit, then I think it is reasonably clear, having regard to the Full Bench ruling of this Court reported as *Janki Singh v. Mahant Jagannath Das* (7), that the plaintiff's rights are barred and that this suit is not maintainable, under Sch. 3, Art. 1, Cl (a). If defendants 6 and 7 are non-occupancy raiyats, then the obligation in law is upon the plaintiff, if he desires to dispossess the defendants, to bring a suit in ejectment to eject defendants 6 and 7 within six months after the expiration of the mortgage or after the mortgage had been redeemed. This the plaintiffs did not do inasmuch as they only brought this suit $2\frac{1}{2}$ years after the mortgage itself was redeemed. The mortgage having been redeemed on 18th June 1913, the present suit was instituted on 11th November 1915.

Clearly, in my opinion, having regard to the Full Bench of this Court this suit was barred. The lower appellate Court found that the plaintiff's claim was not barred by limitation, but the Court failed to consider the question of limitation in the light of the Full Bench ruling of this Court. Accordingly I hold that the plaintiff's suit ought to have been dismissed and that this second appeal is unsustainable in point of law and must be dismissed with costs and the plaintiff's suit in all Courts dismissed with costs.

V.S./R.K.

Appeal dismissed.

(7) [1918] 3 Pat. L. J. 1=14 I. C. 94.

A. I. R. 1919 Patna 395

CHAPMAN AND ROE, JJ.

Anantaram Bohidar — Defendant — Appellant.

v.

Ganeshram Bohidar and others — Plaintiffs—Respondents.

Appeal No. 23 of 1917, Decided on 9th April 1918, from the appellate decree of Sub. Judge, Sambalpur, D/- 7-12-1916.

(5) [1904] 31 Cal. 703.

(6) [1915] 31 I. C. 789.

Limitation Act (9 of 1908), Art. 115—Suit by proprietors against lambardar for account of profits—Period of limitation commences to run from end of each agricultural year.

A suit by the proprietors of a village against a lambardar for an account of the profits of the village management must be brought within the period prescribed by Art. 115, and inasmuch as the lambardar is the agent of the proprietors bound by an implied contract to render an account at the end of each agricultural year, the period of limitation commences to run on the date upon which the account should have been rendered under the implied contract. [P 396 C 2]

B. C. Bose—for Appellant.

Biswanath Singha—for Respondent.

Chapman, J.—This appeal arises out of a suit for an account against a lambardar. The plaintiffs claim to hold a ten-annas share in the village between them. It was alleged that the defendant had a one anna share in the village but that he was the manager of the village and was the customary agent managing the village on behalf of all the cosharers and rendering accounts to them of the profits of the village management. The plaintiff alleged that certain sums had been realized on account of village profits during the previous six years. The plaintiffs asked for an account and alleged that their causes of action had accrued on the 1st June in each year since the year 1910. The defendant contested the suit on various grounds with which we are not now concerned. We are asked to interfere in second appeal on one ground only, and that is the ground of limitation. Both the Courts below have held that the period of limitation is six years under Art. 120, Sch. 2, Lim. Act. In taking this view the lower Courts followed the decision of the Judicial Commissioner of the Central Provinces in *Mohammad Farrukh v. Kadir Ali Khan* (1). No doubt that decision is authority for the view which has been taken by the Courts below.

After giving the matter very careful consideration, and with all respect to the learned Judicial Commissioner, we are of opinion that case was wrongly decided. It is true that a lambardar is appointed by the Government, but that appointment is merely for the purpose of representing the proprietary body in its relation to the Government. The duties imposed upon a lambardar under the Central Provinces Land Revenue Act are concerned only with the relations of the proprie-

tary body to the Government. In so far as for the purpose of convenience, the proprietary body permit the lambardar to collect rents and to manage the village on their behalf, he is their agent and he has been held to be their agent in a series of rulings of the Central Provinces Courts referred to in the Munsif's judgment and in *Sheoba v. Simaria* (2). He is also described as a customary agent in the plaint. We have no doubt that in fact he is, as the agent of the proprietary body, bound by an implied contract to render an account at the end of each agricultural year, that is to say, on the 1st of June every year. It is clear therefore that Art. 89, or rather Art. 115 applies, and it has been held that where an agent is under contract to render a yearly account, his liability to account commences on the date upon which the account should have been rendered under the implied contract, and the period of limitation of three years commences from that date. In these circumstances we are of opinion that the period of limitation was three years commencing with the 1st June 1913, and that the lambardar was liable to render an account for the agricultural year ending on the 1st June 1913, and for the subsequent years up to the 1st June 1915, prior to the institution of the suit. We direct that the decree of the lower Court be modified accordingly and that the costs should be in proportion to the success throughout.

Roe, J.—I agree.

V.S./R.K.

Decree modified.

(2) [1889] 2 C. P. L. R. 171.

A. I. R. 1919 Patna 396

JWALA PRASAD AND ADAMI, JJ.

Abdul Rahim—Defendant—Appellant.

v,

Gujeshar Mahto and others—Plaintiffs—Respondents.

Misc. Appeal No. 259 of 1918, Decided on 29th July 1919, against order of Dist. Judge, Mozafferpur, D/- 28th May 1918.

• (a) Civil P. C. (1908), S. 47—Person applying under S. 47 need not be party to execution proceedings—He must be party to suit in which decree is passed.

Plaintiff and defendant A held a holding jointly. Defendant B, the landlord of the holding, obtained a rent-decree against plaintiff and defendant A and in execution of that decree against the latter alone brought the entire holding to sale. Defendant C purchased the holding at the sale. Plaintiff thereupon brought a suit to have the sale set aside. His plaint was treat-

(1) [1897] 10 C. P. L. R. 98.

ed as an application under S. 47, and the sale was set aside. Defendant C appealed, contending that plaintiff had no right to make an application under S. 47 of the Code, as he was not a party to the execution proceedings, and that his remedy was to apply either under S. 74, Ben. Ten. Act, or under O. 21, R. 90, to set aside the sale:

Held: the S. 47, does not require that a person making an application thereunder should be a party to the execution proceedings, but requires that he must be a party to the suit in which the decree was passed, and as plaintiff was a party to the suit he was competent to make the application. [P 397 C 2]

(b) Civil P. C. (1908), S. 47, O. 21, R. 90—Bengal Tenancy Act, S. 174—Scope of—Application raising question as to execution of decree beyond their scope should be dealt with under S. 47.

Section 174, Ben. Ten. Act, and O. 21, R. 90, Civil P. C., are of limited scope and application, and an application which raises questions as to the execution of a decree, clearly beyond their scope ought to be dealt with under S. 47 of the Code. [P 398 C 1]

Abani Bhusan Mukherji—for Appellant.

Gour Chandra Pal—for Respondents.

Jwala Prasad, J.—This is an appeal against the order of the District Judge of Mozaffarpur, dated 28th May 1918, confirming the order of the Munsif, dated 28th July 1917. The plaintiff and the defendant 4th party held jointly a holding, which originally belonged to the former but by transfer a portion thereof came into the possession of the latter. The defendant 2nd party is the landlord of the holding and obtained a rent decree against the plaintiff and the defendant 4th party and in execution against the defendant 4th party only brought the entire holding to sale. Defendant 1st party, who is the appellant before us, purchased that holding at the auction-sale. The plaintiff thereupon brought a regular suit with the main object of having the sale set aside. The suit was decreed, but on appeal to the District Judge it was held that the suit was barred by the provisions of S. 47, Civil P. C., and the case was remanded to the trying Court with a direction to treat the plaint as an application under S. 47, Civil P. C., and to dispose of it. The parties agreed to this course. On remand, the Munsif set aside the sale, holding that the decree-holder had illegally omitted the plaintiff from the list of the judgment-debtors in the execution proceedings, and that he had not served any of the processes required under the law for the attachment

and the sale of property in execution of the decree.

He also held that the processes were suppressed by the decree-holder in collusion with the Courtpeon. Defendant 1 appealed to the District Judge. The aforesaid findings of fact were not challenged, but the mere contention in appeal was that the respondent had no right to make an application under S. 47 of the Code, and that his remedy was to apply for setting aside the sale either under S. 174, Ben. Ten. Act, or O. 21, R. 90, Civil P. C. The learned District Judge overruled this contention and dismissed the appeal. The contention has been repeated before us in this second appeal. The only question therefore before us for decision is whether the application of the respondent comes under S. 47 or not. The ground urged in support of the contention is that the respondent was not a party to the execution proceedings and, as S. 47 relates only to execution proceedings, he has no right to apply under S. 47. The learned vakil for the appellant has obviously overlooked the provisions of S. 47, which do not require that a person making an application under that section should be a party to the execution proceedings. All that the section requires is that he must be "a party to the suit in which the decree was passed." The plaintiff-respondent was impleaded as defendant along with defendant 4th party in the rent suit in which the joint decree in question was passed. There is therefore no force in this contention, which is overruled. The next ground urged has been that S. 174, Ben. Ten. Act, and O. 21, R. 90, Civil P. C., bar the present application of the respondent from being entertained under S. 47, Civil P. C.

There does not appear to be much substance in this contention also. Both the aforesaid provisions of law have limited scope and application and afford speedy remedy to the judgment-debtor or any person affected by the sale to have the sale set aside either upon deposit made within a certain period from the date of the sale or on showing that there had been material "irregularity or fraud in publishing or conducting the sale" and consequent substantial injury. The application in this case is certainly of a more far-reaching character and although some of the grounds upon which the sale is impugned are covered by the aforesaid

provisions in S. 174 and O. 21, R. 90, still there are other grounds which clearly raise questions as to the execution of the decree and which are beyond the scope of the aforesaid sections. One of the principal grounds is that though the plaintiff-respondent was a judgment-debtor and was interested in the holding, he was not made a party in the execution proceedings and the entire holding including his interest could not be sold in execution of the decree against him and the defendant 4th party. Another important objection to the sale was that no notice was served on the plaintiff-respondent as required by law, particularly notice under O. 21, R. 66, Civil P. C. These latter objections cannot possibly come under O. 21, R. 90, Civil P. C., or S. 174, Ben. Ten. Act. I therefore agree with the view taken by the Courts below that the application was properly dealt with under S. 47.

It has been also urged that the question raised by the application of the respondent is not between the parties to the suit, inasmuch as the appellant is an auction-purchaser and he was not a party to the suit. The application does not at all raise any question subsequent to the sale, but the objections of the respondent as to the sale relate to the proceedings adopted by the decree-holder regarding the execution of the decree and the manner in which the property was brought to sale. The real dispute therefore is between the decree-holder and the respondent, both of whom were parties to the suit; and as the sale was being impugned, the auction-purchaser who purchased the property at the sale was also made a party to the present proceedings. This contention also must therefore be overruled. The result is that the appeal is dismissed with costs.

Adami, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 398

ROE AND COUTTS, JJ.

Emamuddin—Defendant—Appellant.

v.

Mohammad Rashidul Huq and others
—Plaintiffs—Respondents.

Appeal No. 166 of 1918, Decided on 27th March 1919, from appellate decree of Addl. Sub-Judge, Monghyr, D/- 12th November 1917.

Bengal Tenancy Act (8 of 1885), S. 22 (2)
—Person let in as tenant though cosharer proprietor, intending to cultivate is a third person within S. 22.

A person inducted on to land as a tenant and not as a proprietor and as a person intending to cultivate the land with his own ploughs, is a "third person" within the meaning of S. 22 (2), even though he may be a cosharer proprietor.

[P 399 C 1]

Mohammad Ishfaq and Sushil Madhab Mullick—for Appellant.

Kulwant Sahay—for Respondents.

Roe, J.—The land in suit in this case has been recorded in the finally published Record of Rights as being the bakasht of the plaintiff, who is a cosharer proprietor of the village. The case made out in the plaint was that it was not true bakasht land, but it was an old occupancy holding which had been acquired by the plaintiffs and for which they paid rent to their cosharer maliks. The learned Munsif who tried the case came to the conclusion that there was nothing to show that the land had ever been an occupancy jote, and he appears to have accepted the evidence of two of the plaintiffs' witnesses that the land was kamat land. The learned Subordinate Judge does not come to a finding upon this point. He describes the land simply as the bakasht land of the plaintiffs.

The position of the defendant is that he was inducted on to the land by the common manager of the whole body of landlords. He is himself a cosharer proprietor, and it is the case common to both sides that he pays rent not to the whole body of landlords, but to those among them only who are the plaintiffs in this case. The learned Subordinate Judge found that his position is that of a non-occupancy raiyat who can be evicted upon service of notice as one who is holding on a lease from year to year, the suit being one for ejectment. The suit was decreed in the Appellate Court upon this ground. In the Court of first instance the suit was dismissed although as it seems to me if the learned Munsif was going to accept evidence that the land was kamat land he should have accepted that evidence in its entirety and regarded the land as falling under S. 116. That however is immaterial to the present question. We may assume for the purposes of the case, that the plaintiff's story as given in the plaint is the correct story that he is a cosharer proprietor and acquired these lands in the manner contemplated be

S. 22, Ben. Ten. Act, but he has also let out the land in the manner contemplated by S. 22 (2), and that being so the person to whom he has let out the land becomes a raiyat upon the land, and as a raiyat, whether he has a right of occupancy or not he cannot be ejected except upon conditions prescribed in the Bengal Tenancy Act, none of which have been fulfilled. It is however contended by Mr. Kulwant Sahay that a cosharer proprietor of a village is not a third person within the meaning of S. 22 (2). I for my own part fail to appreciate this distinction. It is a mere accident that the defendant in this case holds a small share in the village. He was inducted on to the land as a tenant and not as a proprietor, and as a person intending to cultivate the land with his own ploughs, to my mind he is a third person within the meaning of the section. I would therefore decree this appeal and dismiss the plaintiff's suit with costs in all Courts.

Coutts, J.—I agree.

V.S./R.K. Appeal allowed.

A. I. R. 1919 Patna 399

DAS, J.

Sheo Narain Sahu—Defendant—Appellant.

v.

Ram Nirekhan Ojha—Plaintiff—Respondent.

Second Appeal No. 810 of 1918, Decided on 30th July 1919, from decision of Offg. Dist. Judge, Saran, D/- 28th March 1918.

(a) Mortgage — Redemption—Purchaser of equity of redemption left out of mortgage action—He is entitled to redeem or can be compelled to redeem.

A purchaser of a portion of the equity of redemption who has been left out of a mortgage action, is entitled to claim partial redemption, and may also be compelled to redeem that portion of the mortgaged property in which he may be interested. [P 400 C 1]

(b) Transfer of Property Act, S. 60—Redemption—Exception to rule that person having right to redeem must redeem whole of mortgage property and not part in absence of special bargain stated—Splitting up of mortgage—Effect.

The general rule that a person who has any right to redeem has a right to redeem the whole of the mortgaged property and not a part of it, unless there is a special bargain, is subject to the exception that he has a right to redeem his own share only, where a mortgagee has acquired, in whole or in part the share of the mortgagor. The rule would not apply where the integrity of

the mortgage is broken up, as where the equity of redemption is with two different persons.

[P 399 C 2]

Lakshmi Narayan Singh and Nawal Kishore Prasad—for Appellant.

Rajendra Prasad—for Respondent.

Judgment.—On 9th September 1908, plaintiff's father obtained a mortgage decree against one Mahabir. In that litigation the appellant, the purchaser of a portion of the mortgaged property in execution of a money decree in 1906, was not impleaded as a party defendant. On 11th January 1917, the respondent commenced the action out of which this appeal arises against the appellant for possession of that portion of the mortgaged properties which had passed into the possession of the appellant by virtue of the execution sale held in pursuance of the money decree obtained in 1906. The appellant, in answer to the plaintiff's action, claims the right to redeem the whole of the mortgaged property, and not merely that part of it which is in his possession, and the substantial question which I have to determine in this appeal is whether a purchaser of a portion of the equity of redemption who has been left out of the mortgage action, can be compelled to redeem only that portion of the mortgaged properties which have passed into his possession by such purchase.

It may be conceded that a person, who has any right to redeem, has a right to redeem the whole of the mortgaged property, and not a part of it, unless there is a special bargain. *Hall v. Heward* (1). But an important exception has been engrafted on this general rule, namely that a person has a right to redeem his own share only where a mortgagee has acquired, in whole or in part, the share of the mortgagor. The general rule is, of course, based on the principle that a mortgage is one and indivisible, and that the property comprised in it is in its entirety security for the entire debt and for every part of it; but the general rule cannot obviously apply when the integrity of the mortgage is broken up. In the case before me the plaintiff, who is the mortgagee, has acquired the entire share of the mortgagor, except such share which passed to the defendant by his purchase. The equity of redemption is now in two different persons, namely the plaintiff

(1) [1886] 32 Ch. D. 430

and the defendant, with this result; that the integrity of the mortgage security is broken up.

In such circumstances, it is well settled that a purchaser of a portion of the equity of redemption is clearly entitled to claim partial redemption: see *Hari Kissen Bhagat v. Veliat Hossein* (2), *Gangadas Bhattar v. Jogendra Nath Mitter* (3) and *Hamida Bibi v. Ahmad Hussain* (4). In my opinion, whenever a person is entitled to claim partial redemption, he may also be compelled to redeem that portion of the mortgaged properties in which he may be interested. If this were not so it would require two litigations to work out the equities between the parties. If the defendant were entitled to redeem the whole of the mortgaged property, he would have a charge on the share of his co-mortgagor (in this case, the plaintiff, in whom has vested the remaining interest of the mortgagor) as security for the amount which he has paid in excess of his own proportionate share of the mortgage debt. The defendant, in this case, says:

"I have a right to redeem the whole of the mortgaged property and I claim the right to redeem the whole of the mortgaged property."

To this, the plaintiff has a right to reply as follows:

"Very well, redeem the whole of the mortgaged property, but I claim the right to pay my proportionate share of the mortgage debt and retain the property which I have purchased, free from any charge."

It was exactly to meet a case like this that the last paragraph of S. 60, T. P. Act, was enacted. As the learned Judges in the case of *Sobha Sah v. Inderjeet* (5) said:

"The whole estate, as to one portion of the property, has merged in the mortgagee, and the mortgagor, if compelled to redeem by payment of the whole debt, would have to sue the mortgagee for contribution afterwards, and thus by two suits between the same parties attain the result which under the law as above interpreted is now attained by one suit."

In my judgment the lower appellate Court has taken an entirely correct view of the law. I would therefore dismiss this appeal with costs.

V.S./R.K.

Appeal dismissed.

(2) [1903] 30 Cal. 755.

(3) [1907] 11 C. W. N. 403.

(4) [1909] 31 All. 335=1 I. C. 779.

(5) [1879] 5 N. W. P. H. C. R. 143.

* A. I. R. 1919 Patna 400

MULLICK AND ATKINSON, JJ.

Kisore Chandra Mardaraj — Appellant.

v.

Radha Gobind Das — Respondent.

Second Appeal No. 8 of 1917, Decided on 19th December 1917, from decision of Dist. Judge, Cuttack, D/- 29th November 1916.

* **Animals — Ownership — Wild animals — Game started by A in A's land but hunted into grounds of B — Property in dead body vested in B and not in A.**

Nobody has an absolute property in animals which are *ferae naturae*; at best they are only capable of being the subject-matter of qualified ownership or proprietary right. A wild animal is the property of the person in whose forest it happens to be for the time being: so long as it is in the forest or on the land of such person, he is entitled to take it and to kill it: but when it once chooses to quit his land and go into the land of another, then he ceases to have any property in it and such wild animal becomes the property of that other upon whose land it chooses to make its temporary abode.

A "rogue" elephant appeared in the forest of the plaintiff. There his shikaris inflicted three wounds upon it, but it escaped and entered the lands of the defendants. There the plaintiff's shikaris again inflicted some wounds upon it, but did not kill it. Subsequently as the result of the wounds received by it the elephant died on defendant's lands:

Held: that the proprietary right in the dead body of the elephant vested in the defendant.

[P 400 C 2]

G. C. Paul, S. C. Chakraverty and D. P. Das — for Appellant.

J. N. Bose and B. N. Sinha — for Respondent.

Atkinson, J. — The plaintiff sues in this suit for a declaration that he is entitled to the property in the dead body of an elephant; and coupled with this claim the plaintiff also seeks to recover a sum of Rs. 777, representing the value of this elephant's ivory tusks. The facts are very short. The plaintiff is the feudatory chief of the Nilgiri Estate. In the month of May 1911, a "rogue" elephant appeared in his forest and did considerable damage, killing a woman. Nothing is known as to the antecedent history of the elephant so far as it was or may have been connected with this particular estate; it appears that casually it came into the forest and committed some acts of depredation. The Raja gave orders to his shikaris to pursue the animal and, if possible to kill it. On 29th May 1911 the shikaris succeeded in inflicting three wounds upon the elephant

while it was within the forest of the Raja; but the wounds which were inflicted upon the elephant did not cause its death. The defendant's estate adjoins that of the plaintiff and is situated in Mauza Khunti, which is in British India. The elephant escaped from the lands of the plaintiff and entered the lands of the defendant's zamindari. For two days the elephant was lost sight of by the Raja's shikaris. A few days after the 29th May the plaintiff's shikaris entered the lands of the defendant without the authority and without his leave and again came into contact with the elephant and inflicted some more wounds upon it but did not kill it. Subsequently the elephant was found dead lying within the ambit of the defendant's zamindari. The learned Judge is of opinion that the elephant died of gangrene which probably set in as a result of the gunshots which it had received.

Upon these facts the learned Munsif found in favour of the plaintiff and awarded him a decree for Rs. 658 representing the value of the elephant's tusks. No discussion was raised before the Munsif as to whether the plaintiff was entitled in point of law to recover any money for the tusks or to be declared entitled to the proprietary right in the body of the elephant. For the first time the legal aspect of the case was raised and discussed before the learned Judge on appeal. The learned Judge found as a fact that the elephant which was found dead within the ambit of the defendant's zamindari was the elephant which had been seen in the plaintiff's forest on or about 29th May 1911. It is contended before us that inasmuch as the elephant was started in the plaintiff's forest and pursued into the lands of the defendant and there killed that the proprietary right in the dead body of the elephant was vested in the plaintiff; and that the defendant had no proprietary right in the elephant or in its tusks.

A dispute having arisen between the plaintiff and the defendant as to the ownership of this elephant's body, the District Magistrate directed an inquiry to be held; and a Sub-Deputy Magistrate was appointed to hold the inquiry. He came to the conclusion that the property in the elephant belonged to the defendant and accordingly he directed that the tusks and the dead body of the elephant should

be handed over and delivered to the defendant. Hence this action has been instituted by the plaintiff. We are bound by the finding arrived at by the learned Judge that the elephant which was found dead in the zamindari of the defendant was the elephant that was seen in the forest of the plaintiff on or about 29th May 1911. The matter which arises for legal decision is one of interest and importance and not altogether free from difficulty.

It is well to consider the principles which apply to the property in animals wild by nature. Nobody has an absolute property in animals which are *ferae naturae*; at best they are only capable of being the subject-matter of qualified ownership or proprietary right. A wild animal is the property of the person in whose forest it happens to be for the time being; so long as it is in the forest or on the land of such person, he is entitled to take it and to kill it; but when it once chooses to quit his land and go into the land of another, then he ceases to have any property in it and such wild animal becomes the property of that other upon whose land it chooses to make its temporary abode. The arguments that have been addressed to us which concern this case are based on the authority of the three propositions laid down by Lord Holt in 1697 in *Sutton v. Moody* (1), and of these three propositions there is certainly doubt with regard to at least two. The propositions shortly summarized are as follows:

"(1) If A starts a hare in the ground of B and hunts it and kills it there, the property continues all the time in B.

The first proposition is simply the case of an ordinary trespasser or poacher going upon the lands of another and killing game upon his lands; in such a case the property in the animal beyond all doubt is in the person upon whose land the animal is killed. The second proposition stated by Lord Holt is as follows:

"If A starts game in a forest or warren of B and hunts it into the grounds of C and there kills it, the property is in B, the proprietor of the chase or warren where the game was first started, because the privilege of pursuit continues and consequently B is entitled to the absolute property in the dead game so chased and killed by A."

This second proposition has not been generally accepted as sound law; and its

(1) [1697] 1 Ld. Raym. 250.

authority was questioned by Lord Westbury and Lord Chelmsford in the well-known case of *Blades v. Higgs* (2). The foundation upon which this proposition rests is that there is an alleged right of pursuit in favour of the person upon whose land the game was first started to follow it into the lands of another and kill and appropriate it. It is not denied that the person who actually effected the pursuit would be answerable in damages for trespassing upon such other person's land; and that thus a wrongdoer would be entitled to profit by his wrong and claim the property in the game he had pursued and killed upon another's land. Glaringly inconsistent as this proposition may appear, judged in the light of legal principles its application can, by an example, be shown to be anomalous, and capable of being reduced to an absurdity. Suppose the case of a wild animal started in one person's land which traversed the land of 10 other persons in succession and there killed, with whom would the right by pursuit rest to justify the taking of the animal so killed as his property? Would it be with the first person who started the animal; or would the right vest in each successive owner or occupier of land over which the animal by chance travelled; or would the right to claim the animal, when killed, be in the person upon whose land he was actually killed or captured? To ask the question is to answer it. To hold that each person over whose land the animal travelled would have a right by pursuit would lead to an obvious absurdity; while on the other hand to hold that the person upon whose land the animal was killed was entitled to the property in it would seem to be sane, sensible and logical; otherwise chaos and confusion would inevitably prevail. The third proposition is as follows:

"If A starts a hare in the ground of B and hunts it into the ground of C and there kills it, the property in the hare is in the hunter."

This third proposition has not been accepted by any Court. The case of *Blades v. Higgs* (2) was decided on the authority of the first proposition alone. The facts in that case were that a certain poacher entered the grounds of Lord Exeter and there chased and killed some hare and rabbits and it was held that the

property in the dead game belonged to Lord Exeter and that he was entitled to recover the value thereof from the poacher. The contention put forward by the learned vakil appearing on behalf of the appellant before us is based not on the first but on the second proposition laid down by Lord Holt, namely:

"If A starts game in the forest or warren of B and hunts it into the grounds of C and there kills it, the property is in B, the proprietor of the chase or warren from which it was started."

It is argued therefore that the elephant was chased from the forest of the Raja, the plaintiff, into the lands of the defendant and killed by the Raja or his servants; and that consequently the property in the elephant is, and has always been, in the Raja. It appears to us that the second proposition laid down by Lord Holt cannot be accepted as an authority, which we are coerced to follow. It has never received, so far as I am aware, judicial sanction or approval; on the contrary, its value as a judicial exposition of the law with reference to the property in wild animals was certainly doubted in *Blades v. Higgs* (2). Having regard to the doubts which have been expressed as to the 2nd and 3rd propositions laid down by Lord Holt by two such eminent Judges as Lord Westbury and Lord Chelmsford, it seems to us that it would be wrong to follow it as a settled principle of law. Lord Chelmsford in dealing with these propositions says:

"I think Lord Holt must have been of opinion that as long as the game continued upon the land there was a species of property, or rather perhaps a right to take it, existing in the owner of the land, which was sufficient to make it his the instant, by being killed or taken, it became the subject of property. But I cannot so easily discover the principle upon which he proceeds when he said that: 'If A starts a hare in the ground of B and hunts it into the ground of C and kills it there, the property is in A, the hunter, but A is liable to an action of trespass for hunting in the grounds as well of B as of C.'"

"I have some difficulty in understanding why the wrongdoer is to acquire a property in game under the circumstances here supposed. If the animal had left the land of B and passed into the land of C of its own will, and had been, immediately it crossed the boundary, killed by C, it would unquestionably have been his property. Why then should not the act of a trespasser to which C was no party, have the same effect as to his right to the animal as if it had voluntarily quitted the neighbour's land? And why not only should B lose his right to the game, and C acquire none, but the property, by this accident of the place where it happened to be killed, be transferred to the trespasser? It would appear to me to be more in accordance

(2) [1865] 11 H. L. C. 621.

with principle to hold that if the trespasser deprived the owner of the land where the game was started, of his right to claim the property by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner and not for himself."

Then again his Lordship says :

"It is much more reasonable to hold that the trespasser having no right at all to kill the game, he can give himself no property in it by his wrongful act; and that as game killed or reduced into possession is the subject of property, and must belong to somebody, there can be no other owner of it, under these circumstances, but the person on whose ground it is taken or killed."

Lord Westbury also says :

"Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner."

Thus the second proposition laid down by Lord Holt and relied upon by the plaintiff has not been accepted by those distinguished Judges and cannot be accepted by us. It is not contended in this case that the third proposition would apply. There is no evidence at all that the elephant died as a direct result of the act of the Raja or his servants. The elephant was found dead in the defendant's zamindari from a disease which was probably the result of wounds inflicted upon him; but it has not been proved who shot and killed the elephant. It was found by the defendant on his property dead with neither the plaintiff nor his servants near it, and to our mind it would be an absurdity in this state of facts to hold that the plaintiff has acquired any property or right in the body or tusks of this dead elephant; nor can it be said that the plaintiff or his servants captured the elephant by killing him; and thus it appears to us clear that for this reason the second proposition laid down by Lord Holt, even if sound law, can have no application to the facts of this case as contended for, inasmuch as the proposition contemplates the pursuit of game and capturing it by death. According to the opinion expressed by Lord Chelmsford, cited above, which appears to us to be sound, the elephant was the property of the defendant and not of the Raja. Reliance has been placed upon the case reported as *Makath Unni Moyi*

v. Malabar Kandapunni Nair (3), but upon a careful perusal of that, case it appears to us that it has no application to the facts of this case. Therefore, it appears to us both upon facts and upon the principles of law applicable to the case the learned Judge was right in the conclusion at which he arrived; and that he properly decreed the defendant's appeal and dismissed the plaintiff's suit. We dismiss this appeal with costs.

Mullick, J.—I agree.

V.S./R.K.

Appeal dismissed.

(3) [1882] 4 Mad. 268.

A. I. R. 1919 Patna 403

ROE, J.

Gobind Dube—Appellant.

v.

Parmeshwar Dube—Respondent.

First Appeal No. 211 of 1918, Decided on 13th December 1918.

Court-fees Act (1870), Ss. 5, 7 (i) and (iv), Sch. 2, Art. 17 (vi)—Suit for partition—Court-fees payable is Rs 10—Suit for recovery of money or immovable property—Court fee payable is ad valorem—Partition, Court-fee.

If a suit is a plain suit for partition, the court-fee payable thereon is Rs. 10. If it is in essence a suit to obtain a decree for money or a decree for immovable property, then an ad valorem court-fee must be paid. [P 404 C 1]

Facts.—The plaintiff brought a suit for partition of a joint family property and paid a court-fee of Rs. 10. In the plaint the plaintiff also asked that accounts of the family business transactions should be taken from 1252-F. The case was taken up in appeal to the Calcutta High Court. Their Lordships of the Calcutta High Court, while disposing of the case, had some hesitation in deciding whether or not it was permissible in partition proceedings to carry back the accounts beyond the existing state of things but eventually concluded thus:

"The result of these authorities, I think, is that in an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the karta is liable for is as to the existing state of the property divisible."

The Hon'ble Judges therefore granted a preliminary decree and ordered an account of the existing state of joint property to be taken. On this basis partition took place and a final decree was prepared. Against the final decree this appeal was preferred to the High Court and the appellant stamped the appeal with a court-fee of Rs. 10 only. The Stamp Reporter objected to the court-fee on the ground that the suit must be

treated as one for accounts, inasmuch as the plaintiff had asked also for an account of the family business transactions since 1252-F. The taxing officer disagreed with the Stamp Reporter and referred the matter to the taxing Judge.

Order.—I adhere to my former opinion that each of these suits must be looked at on its merits and if indeed it is a plain suit for partition, the court-fee thereon is Rs. 10. If it is in essence a suit to obtain a decree for money or a decree for immovable property, then an ad valorem court-fee must be paid. There is no doubt, and it is conceded by the learned vakil for the appellant, that at the outset the suit before us was a suit to recover moveable property, but that form has been removed by the High Court by its judgment in the case when it first came before it. The preliminary decree now made is a plain preliminary decree for partition such as was contemplated in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullik* (1). Being now merely a partition suit a court-fee of Rs. 10 is sufficient.

V S / R K. *Order accordingly.*

(1) [1861-63] 9 M. I. A. 123=1 Sar. 837 (P. C.)

A. I. R. 1919 Patna 404

MULLICK AND THORNHILL, JJ.

Khidir Bux and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 119 of 1918 Decided on 24th July 1918, from order of Sess. Judge, Purnea, D/- 30th April 1918.

(a) Evidence Act (1872), S. 114, Illus. (e)—Presumption under.

Under S. 114, Illustration (e), a Court may presume that all acts done in connexion with an official document were legally performed.

[P 405 C 1]

(b) Evidence Act (1872), S. 101—Legality of warrant impugned as it was signed by sheristadar—That it was signed by him without authority must be proved by person who impugns its validity

Where the legality of a warrant of attachment is impugned on the ground that it is signed by the sheristadar of the executing Court and not by the presiding officer of the Court, the burden of proving that the sheristadar had no authority to sign the warrant is on the person alleging it.

[P 405 C 1]

(c) Civil P. C. (1908), O. 21, R. 24—Attachment is illegal unless warrant is sealed with seal of Court issuing it.

Order 21, R. 24, Civil P. C., requires that a warrant of attachment should be sealed with the seal of the Court issuing it. The injunction is mandatory and unless it is complied with, the

warrant and the attachment effected under it are illegal.

[P 405 C 1]

(d) Penal Code (1860), S. 147—Accused charged with rioting with common object of resisting attachment—Attachment warrant not sealed with Court seal—No offence is committed—Civil P. C. O. 21, R. 24.

Where in a case in which the accused were charged with rioting with the common object of resisting the attachment of a property, it was found that the warrant of attachment was not sealed with the seal of the Court:

Held: that the warrant and attachment being illegal, it was not an offence to resist the attachment.

[P 405 C 2]

(e) Criminal Trial—Accused pleading accident must show that offence was result of accident—Penal Code, S. 80.

Every man must be presumed to intend the natural result of his acts. If an accused person pleads accident, he must show that the offence with which he is charged was the result of an accident.

[P 405 C 2]

(f) Penal Code (1860), S. 325—Accused striking with lathi and with single blow causing fracture of skull resulting in death—He is guilty of at least under S. 325.

Where the accused struck the deceased with a lathi on the head and with a single blow caused a fracture of the skull which resulted in death:

Held: that the accused was guilty at least of an offence under S. 325, Penal Code. [P 406 C 1]

Ram Lal Dutt—for Appellants.

Muhammad Fakhruddin—for the Crown.

Mullick, J.—This appeal arises out of a riot which is alleged to have taken place on 16th December 1917 in a village in the District of Purnea, because a civil Court peon attached some moveable property belonging to a judgment-debtor named Abdul Gafoor. It is alleged that the common object of the unlawful assembly was to illegally rescue the attached property. It has been found by the learned Sessions Judge that a riot with the alleged common object did take place, and that the appellants Khidir Bux and Jabbar Bux and four others were members of the riot. With regard to Abdul Gafoor the learned Judge has found that he remained at the door of his house some distance from the riot and he has been found guilty of an offence under S. 147, I. P. C., read with S. 114, of having abetted the riot by calling out "Run, run, my properties are being taken away." The learned Sessions Judge has sentenced Khidir Bux to rigorous imprisonment for six months under S. 147, I. P. C., and Abdul Gafoor to a like term of imprisonment for an offence under S. 147/114, I. P. C. He has sentenced Jabbar Bux to rigorous imprisonment for six months under S. 147, I. P. C., and

rigorous imprisonment for one year under S. 323, I. P. C., the two terms to run concurrently.

The assault in the course of the riot is alleged to have consisted of one lathi blow by Jabbar Bux on the head of Tahir, who was assisting to carry away the attached property, and of a lathi blow on Kamaruddin by Khidir Bux after Tahir had been injured. Tahir appears to have been able to walk home a distance of 8 to 9 miles with assistance on that day, but later on, about nightfall, he was taken by cart to the Kishengunj hospital, where he died on 18th December from haemorrhage due to the injuries on his head. Kamaruddin is alleged to have had a scratch which he showed to the police, but which was apparently not shown to the doctor. Now the first point raised by the learned vakil for the appellants is that the warrant of attachment was illegal, firstly, because it was not signed by the Munsif who issued it, but by his sheristadar; and secondly, because it does not bear the seal of the Court. With regard to the defect as to the signature, I think the onus of proving that the sheristadar had no authority to sign the warrant was on the defence, because under S. 114 (e), Evidence Act, a document being admittedly an official document the Court may presume that all acts in connexion with it were legally performed. With very great respect to their Lordships of the Calcutta High Court in *Deputy Legal Remembrancer v. Mir Sarawarjan* (1), I venture to think that it is not for the prosecution in such a case as this to prove the authority of the officer signing it, and if their Lordships intended in their ruling to lay down that the onus in every case was upon the prosecution to prove that all acts done in connexion with official documents were done legally, then I respectfully venture to differ.

The second point however is fatal to the prosecution. The Civil Procedure Code in O. 21, R. 24, requires that the warrant shall be sealed with the seal of the Court. The injunction is mandatory and unless it is complied with, the attachment is in my opinion illegal. Their Lordships of the Privy Council in *Ram Dayal v. Mahtab Singh* (2) held in reference to a warrant, which did not bear

the signature of the issuing Court, that the whole execution proceedings connected with that warrant were illegal and void. In my opinion therefore the attachment having been illegal, it was not an offence to resist the attachment and therefore the common object charged was not an unlawful common object and therefore the charge of rioting cannot be sustained. The conviction of Khidir Bux and Abdul Gafoor under S. 147 read with S. 114, I. P. C., must be set aside. Khidir Bux has also been convicted under S. 323, I. P. C., for having struck Kamaruddin, but that assault appears to have been very slight and having regard to the period which he has already spent in jail it is not necessary to impose a separate sentence for this offence. Therefore both Abdul Gafoor and Khidir Bux will be set at liberty:

There remains the case of Jabbar Bux. The learned Sessions Judge, disagreeing with the assessors who found the accused guilty of culpable homicide not amounting to murder under S. 304, I. P. C., has sentenced him to one year's rigorous imprisonment under S. 323, I. P. C., only. Now the learned Sessions Judge appears to think that Jabbar Bux had no intention of causing death, or any knowledge that death was likely to be caused by his blow, nor any intention to voluntarily cause grievous hurt, and that he accidentally struck the deceased on the head with his lathi. Notice was issued upon Jabbar Bux to show cause why his conviction should not be revised and the sentence enhanced and after hearing the learned vakil on his behalf, I am unable to see how the learned Sessions Judge's finding can be supported. Every man must be presumed to intend the natural result of his acts. If the appellant pleads accident, it is for him to show that it was an accident, and I see no ground for the assumption on the part of the learned Sessions Judge that it must have been an accident under the circumstances. Certainly there is no evidence to justify such an assumption upon the record. The post mortem report shows that there were two large fractures of the skull and it is clear that although one blow was struck, that blow must have been dealt with great force. In my opinion the assessors were probably right in coming to the conclusion that an offence under S. 304, I. P. C., had been committed, but taking

(1) [1902] 6 C. W. N. 845.

(2) [1885] 7 All. 506.

the most favourable view to the accused he ought to have been convicted at least of an offence under S. 325, I. P. C. It is to be noticed that Jabbar Bux had no concern with the civil dispute and his intervention in the attachment of the property appears to have been purely gratuitous. Taking all the circumstances into consideration, we do not think that a sentence of less than three years' rigorous imprisonment will meet the justice of the case. The order that we therefore pass is that the conviction and sentence under Ss. 147 and 323, I. P. C., are set aside and Jabbar Bux is sentenced under S. 325, I. P. C., to rigorous imprisonment for a term of 3 years. The imprisonment already suffered by him will count towards this sentence.

Thornhill, J.—I agree.

V.S./R.K. Order accordingly.

A. I. R. 1919 Patna 406

DAS, J.

Hira Singh—Plaintiff—Appellant.

v.

Keshwar Lal and another—Defendants—Respondents.

Second Appeal No. 618 of 1918, Decided on 10th July 1919, from decision of Dist. Judge, Chapra.

Bengal Tenancy Act (1885), S. 60 — Suit for rent by registered proprietor—Tenant cannot plead that third person is entitled to recover rent—He cannot decide to whom to pay rent.

Under S. 60 it is not open to a tenant to plead in defence to a suit brought by the registered proprietor that a third person is entitled to receive the rent, nor is it for him to decide to whom he must pay rent. [P 407 C 1]

Jalobind Prasad Singh—for Appellant.

Har Nandan Sahay—for Respondents.

Judgment—The plaintiff is the proprietor in respect of the land of which the defendant is a tenant. Admittedly he has been recorded as the proprietor in the Land Registration Department. He brought a suit for recovery of arrears of rent from 1320 to 1323 and was met with the defence by the tenant that he had paid rent to the mortgagees in possession. This defence found favour with the Courts below with the result that they have dismissed the plaintiff's suit.

In this Court the learned *wakil* appearing on behalf of the appellant urges that under S. 60, Ben. Ten. Act, the tenant was not entitled to plead any defence to a claim by the person registered as the

proprietor under the Land Registration Act of 1876 that the rent is due to any other person. In my opinion this contention is well founded and must prevail. The whole object of S. 60, Ben. Ten. Act, is to give to a registered proprietor facilities for recovering rent and to prevent tenants from setting up a false and fictitious defence by pleading that a third person not registered was entitled to receive rent: see the case of *Sakari Datta v. Ainuddy* (1). The defence put forward in this case by the tenant is calculated, in my opinion, to perpetuate the mischief which it was the intention of S. 60, Ben. Ten. Act to prevent. The case reported as *Hem Chunder Misri v. Rajah Sir Sourindra Mohan Tagore* (2) is in favour of the appellant.

The Court below however relied upon two cases. The first of that is reported as *Durga Das Hazra v. Samash Akon* (3). It seems to me that that case was decided upon the findings of facts arrived at by the final Court of facts dealing with that case. The learned Judges in that case say:

"We think that on the findings of fact arrived at by the learned District Judge the provisions of S. 60 are not applicable to the present case. The Judge finds that the plaintiffs ceased to be in possession of the land in respect of which they claim rent some four years prior to suit, that is to say, since the defendant in good faith attorned to the Poddars and commenced to pay them rent, and we are unable to see any error of law in this finding."

It is clear therefore that, so far as *Durga Das Hazra v. Samash Akon* (3) was concerned, that decision was given on the findings of fact of the lower appellate Court. The other case relied upon by the lower appellate Court is the case of *Girish Chandar Chongdar v. Satish Chandra Sarkar* (4). It was held in that case that S. 60, Ben. Ten. Act, does not preclude a tenant defendant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect. The plaintiff in that case claimed to realize rent from the tenant. He was undoubtedly registered as the proprietor in the Land Registration Department. But in a case

(1) [1910] 6 I. C. 336.

(2) [1901] 5 C. W. N. 482.

(3) [1900] 4 C. W. N. 606.

(4) [1903] 12 C. W. N. 622.

which was fought out between the plaintiff and another party it was established in a Court of competent jurisdiction that the plaintiff had no title to the land. It appears to me that that case is distinguishable from the present case. In this case no Court has held that the plaintiff has no title to the land. In other words, his title, as the proprietor of the land, is admitted, but all that is urged before me is that although the plaintiff is undoubtedly the proprietor of the land, still as there is a mortgagee in possession it is the mortgagee in possession who is entitled to rent from the defendant. In my opinion it is not for the tenant to decide as to whom he must pay rent. Plaintiff is the registered proprietor and under S. 60, Ben. Ten. Act, the tenant must pay rent to the registered proprietor. Of course as between the registered proprietor and the mortgagee in possession the question remains an open one and the mortgagee in possession clearly, if he can prove his title, has a remedy against the registered proprietor. I hold therefore that the plaintiff is entitled to rent from the defendant for 1320 to 1323. The learned vakil on behalf of the respondent states before me that there is no dispute as to the amount of rent. I would therefore allow this appeal, set aside the judgments and decrees of the Courts below and in lieu thereof give a decree to the plaintiff for the amount claimed by him in the suit. The plaintiff is entitled to his costs throughout.

V.S./R.K.

*Appeal allowed.***A. I. R. 1919 Patna 407**

ROE AND JWALA PRASAD, JJ.

Lachman Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 481 of 1917, Decided on 25th January 1918, against order of Judicial Commissioner, Chota Nagpur, D/- 3rd December 1917.

Penal Code (1860), S. 463—Printed copy of certificate never given is not forgery unless intended to cause it to be believed that it was made by authority of giver.

The making of a printed paper purporting to be a reproduction of a certificate that was never given does not constitute forgery, unless there was an intention to cause it to be believed that the printed paper was made by the authority, express or implied, of the giver of the certificate.

[P 408 C 1, 2]

Pugh—for Petitioner.*Manohar Lal*—for the Crown.

Judgment.—The petitioner has been sentenced under S. 471, I. P. C., to four months' rigorous imprisonment and a fine of Rs. 200. The facts found are that being desirous of obtaining a temporary appointment under the Public Works Department in Ranchi, he presented to the Superintending Engineer, Mr. Wardle, a paper purporting to be a printed reproduction of certificates from former employers. Among these certificates was one from Mr. Clayton, now Chief Engineer, Irrigation Department, Bihar and Orissa, given 20 years ago when Mr. Clayton was an Executive Engineer at Cawnpore. Mr. Wardle was informed by Mr. Clayton that he could not possibly have given any such certificate as that reproduced in print, for the simple reason that the petitioner was 20 years ago so bad an officer that his delinquencies were still fresh in Mr. Clayton's memory. The petitioner at once protested that Mr. Clayton's memory was at fault, and still protests that though the original certificate given by Mr. Clayton has been lost, the printed paper reproduces a genuine certificate. The Courts below have found against him, and have held the making of a printed paper purporting to be a reproduction of a certificate that was never given constitutes forgery.

We have no hesitation in saying that the finding of fact is correct. The last line of Mr. Clayton's certificate runs:

"He leaves as his services are no longer required."

The date of the certificate is 29th November 1897. Lachman Lal was removed from his office under Mr. Clayton on one month's notice, as a hopelessly unsatisfactory officer. On 25th September 1897 Mr. Clayton had written:

"It has been found quite impossible to trust him to supervise work without the most constant inspection."

In the certificate of 29th November it is written:

"He is quite capable of holding charge of a construction subdivision."

Another passage in the certificate runs: "I have always found him hardworking and attentive to his work."

In Mr. Clayton's report it is written:

"He is absolutely untrustworthy, does not tell the truth about his work which is mostly very bad, both earthwork and masonry work."

It is idle to suppose that Mr. Clayton could have given a certificate such as that

produced in print. The contest seems to have raged in the Courts below so fiercely around the accuracy of Mr. Clayton's memory that the equally important question, whether the preparation and use of the printed certificate constituted the offence charged, has been dealt with in a summary fashion. The learned Magistrate quotes in support of his view the case of *Essan Chunder Dutt v. Prannauth Chowdhry* (1). That case is authority only for the proposition that where the holder of a certified copy makes an addition to that certified copy over the signature of the copying clerk, intending it to be believed that the copying clerk had himself made the whole document, the addition to the copy amounts to forgery. The essence of the making of a false document is the intention of causing it to be believed that such document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority it was not made, etc. There was never an intention of causing it to be believed that the printing of the certificates was done either by Mr. Clayton or by his authority. The learned Judicial Commissioner holds that the printed copy was made with the intention of causing it to be believed that a part of the printed copy was made by the authority (implied) of a person (Mr. Clayton) with whose authority the accused knew that it was not made. This no doubt would be logical in particular circumstances, such as for instance, the circumstances of *Emperor v. Ali Hasan* (2). In that case Ali Hasan not only knew that the document he was copying was false, but also was a muharrir having authority to issue copies of authentic documents. The distinction that we would draw between *Ali Hasan's* case (2) and the case before us is that where the maker of the copy has authority to make the copy, a false copy is a false document, but where the maker of the copy holds no office which could be reasonably believed to give him such authority, it would be an undue stretching of the law to say that it was intended to be believed that he had such authority. The facts of the case of *Upfold v. Leit* (3), quoted in Halsbury's Laws of England, are not available. On the facts of the case before

us we are not of opinion that there was any intention to cause it to be believed that the printed paper was made by the authority of Mr. Clayton, express or implied.

The learned Judge was of opinion that an offence under Ss. 417 and 511 has been committed. The petitioner was charged under S. 420 read with S. 511 in the Magistrate's Court and acquitted on the charge. It is open to us in revision to alter the finding and to convict him upon a charge of attempting to cheat, if upon the facts found the attempt at cheating has been clearly proved. In this connexion we have examined the whole of the original certificates submitted to Mr. Wardle when called for by him and also a printed reproduction of the petitioner's certificates made prior to the year 1912 and certified by the State Engineer, Benares Cantonment, to correspond with the original certificates. The original certificates account for the petitioner's movements from September 1884 to April 1885, November 1886 to March 1887, February 1891 to October 1891, June 1892 to November 1892, March 1898 to August 1898, April 1901 to April 1910, June 1911 to June 1912, January 1914 to June 1914, October 1914 to December 1914. The print prepared in 1912 contained in addition to these original certificates his Roorkee certificate, dated 23rd October 1883, and certificates from employers for April and May 1884, August 1887 to February 1889, September 1892 to February 1893, February to May 1896, February 1896 to March 1897, and March 1897 to November 1897. The reprint of 1914 omits the record of service up to 1895, and carries the petitioner's service up to 1914. Before deciding that the petitioner was guilty of an attempt to cheat in using a paper part of which was a copy of a bogus certificate, it would be necessary to prove that he intended by his use of the paper as a whole to deceive Mr. Wardle by the inclusion of false matter, and induce him to do a thing which he would not have done unless deceived by that inclusion. It would be extremely difficult to deceive Mr. Wardle by means of this printed copy, for if Mr. Clayton's certificate had any weight at all with Mr. Wardle, Mr. Wardle was certain to consult Mr. Clayton with regard to the petitioner's fitness for employment. Presumably the petitioner's

(1) Marsh 270=2 Hay 236.

(2) [1906] 28 All. 358.

(3) [1801] 5 Esp. 100.

memory of Mr. Clayton's attitude towards him was as keen as Mr. Clayton's own memory upon the point, and indeed a subordinate dismissal is more likely to recollect the facts of his dismissal than the officer who brought about that dismissal. It is extremely unlikely that he deliberately intended to bring it to Mr. Wardle's notice that he was well-known to Mr. Clayton.

It is no doubt beyond question that the original printing up of these papers was made with a general intention to deceive, but that is not the offence with which the petitioner was charged in the Ranchi Court; nor could such an offence be charged in the Ranchi Court unless it were proved that the printing was done in the Ranchi jurisdiction. It is particularly to be noted that the paper of 1912 contained Mr. Clayton's certificate. Before the accused could be convicted of the particular offence of attempting to cheat Mr. Wardle, it must be found as a fact that the petitioner particularly intended to deceive Mr. Wardle with regard to Mr. Clayton's opinion of the petitioner's capacity. We are not prepared to say on the facts on the record that this has been established, and in the circumstances of the case are not prepared to grant a retrial in order that this may be established. The petitioner passed out of Roorkhee in 1883 and must be now an elderly man. His folly, in laying before Mr. Wardle the old deceptive printed certificates instead of the originals given by Stewart and Company of good service from 1901 to 1910, and of Mr. Brebner of good service in 1914, has landed him in such grievous trouble that we may say that the offence committed by this use of a record of service, in part false, has brought him already sufficiently heavy punishment. Upon these grounds the petitioner is acquitted and discharged from his bail.

V.S./R.K. *Rule made absolute.*

A. I. R. 1919 Patna 409

DAWSON-MILLER, C. J. AND
MULLICK, J.

Aditya Prasad and others—Plaintiffs-Appellants.

v.

Parmananda Patel and others—Defendants—Respondents.

Appeal No. 17 of 1917, Decided on 15th January 1919.

C. P. Tenancy Act (9 of 1898), S. 69—Permanent lease of *sir* and *bhogra* land are not prohibited — Tenant pleading cannot be ejected.

There is nothing in the terms of S. 69 from which it may be inferred that every tenant holding *sir* lands is on that account liable to be ejected, nor is there anything in the section which would bar the defendant, in a suit in ejectment from *bhogra* land, from setting up a permanent lease granted by the proprietor himself. The granting of such permanent leases by proprietors of *bhogra* land is not forbidden by either the Tenancy or the Land Revenue Act. [P 411 C 1;2]

M. S. Das and J. N. Bose—for Appellants.

S. C. Mukherji—for Respondents.

Dawson-Miller, C. J.—The plaintiffs Debi Prasad Patnaik and his two brothers are the gountias of Mauza Sudhamal in the Sambalpur District. In the year 1915 they filed a suit in the Munsif's Court at Sambalpur to eject the defendants as ordinary tenants from their *bhogra* lands and to recover *khas* possession. The defendants pleaded that they were not ordinary tenants; that about 50 years ago the lands in suit, together with some *rai-yati* lands, were leased in perpetuity at a yearly rental of Rs. 11-8-0 to Dakhu, the great grandfather of the defendant 1, and one Damodar by Balmakund Patnaik, a former gountia of the village; that the land in suit had remained in the possession of the defendant's family ever since the *bhogra* lands paying an invariable rent of Rs 9, the rent of the other parcel, which was *rai-yati* land and subject to enhancement, having been from time to time enhanced; that the *bhogra* lands were afterwards divided between the lessees, the portion of the defendants' grandfather coming into the possession of defendant 1, the other defendants being his co-sharers, that this lease had been granted on the express condition that the lessees should construct a tank and a *kata* in the village for the use of the villagers and for the improvement of the land, and that these conditions were duly fulfilled. They contended that the defendants, being tenants in perpetuity were not liable to ejectment. The Munsif as well as the Subordinate Judge of Sambalpur, before whom the case came on appeal, found that the lease relied upon by the defendants was in fact granted and dismissed the suit. On appeal to the High Court the case was remanded to the lower appellate Court for the purpose of ascertaining whether Balmakund, the original lessor, had power

to grant the lease in perpetuity binding his successors. The answer to this question would depend upon the nature of the interest held by Balmakund.

The case was remanded with directions to the lower appellate Court to answer the following questions: (1) Had Balmakund a permanent or a temporary tenure as gountia in the lands in suit. (2) If so was it heritable. (3) Do the plaintiffs claim to eject the defendants by right of inheritance as gountia in respect of Balmakund's interest? If not do the plaintiffs claim under any other title to eject (4) Have the plaintiffs or their predecessors acquired the status of protected gountia under S. 65, (a), Central Provinces Tanancy Act. The lower appellate Court had power to take further evidence on these points, if necessary. No further verbal evidence was adduced before the Subordinate Judge on remand, but copies of two orders passed by Mr. Bowie, Deputy Commissioner of Sambalpur in 1870, and by Mr. A. M. Russell, the settlement officer in 1878, relating to the proprietary rights of the gountias in Mauza Sudhamal were referred to as well as Mr. Russell's Reports on the Land Revenue Settlement of the Sambalpur District of 1876-1877 and the Settlement Reports of 1885 to 1889 and Mr. Devar's Reports of 1906. From these documents it appears that the village in question was at first granted mafi to the Patnaik family by the native Government but was subsequently assessed to land revenue. It however continued in the Patnaik family passing succession from one member to another until 1858, when the then gountia being unable to pay the revenue made over his interest in the village to Balmakund, and the order of Mr. Bowie, already referred to, recognized proprietary right of Balmakund Patnaik in Mauza Sudhamal. What the exact interest of the gountias of this village was in the property before that date is perhaps a matter of conjecture. It was contended that according to the Settlement Report of Mr. Russell the gountias of Sambalpur were at first merely lessees holding under temporary leases and that proprietary rights were not conferred on them until 1870. The learned Subordinate Judge came to the conclusion from a perusal of the history of this particular village that Balmakund was recognized as proprietor in 1870, and that

even before that he and the Patnaik family had a heritable right to the village and not merely a temporary tenure. His answer to the first question therefore may be taken as being that Balmakund had a permanent not a temporary tenure as gountia in the lands in suit, and his answer to the second question was in the affirmative. In answer to the third question he found that the plaintiffs claimed to eject the defendants by right of inheritance as gountias in respect of Balmakund's interest and not under any other title. His answer to the fourth question was in the negative.

From this judgment the plaintiffs appealed to the High Court and contended in effect that the evidence adduced before the lower appellate Court did not support the findings of the learned Judge. It was contended that the Settlement Reports, and especially that of Mr. Russell, clearly showed that before 1870 the proprietary right in the village belonged to Government or to the zamindar and that the gountias had no permanent transferable interest even in the bhogra lands, and that it was not until 1870 that the proprietary right in the bhogra lands was given to the gountias and that as the lease in question was granted 50 years ago i.e., before 1870, Balmakund had no interest at that time which would entitle him to grant a permanent lease binding upon his successors. The respondents contended firstly that the evidence was quite sufficient to justify the conclusion that even before 1870 the gountias had a permanent transferable right in the bhogra lands, and secondly that even if their proprietary right was not conferred until 1870 the transferor having acquired a permanent transferable interest, at all events in 1870, the transfer must be taken to operate on the interest, then acquired, Balmakund the transferor being then alive and that S. 43, Transfer of Property Act was applicable to the circumstances of the present case. On referring to Mr. Russell's report and the correspondence annexed thereto it appears that the question of resettling the land revenue of Sambalpur was taken up by Mr. (afterwards Sir Richard) Temple in 1862, when settlement operations were commenced throughout the provinces, and orders were issued by him for making a settlement on precisely the same principles as

those followed in other districts the characteristic of which was that the village headmen or gountias were to be made proprietors of their villages and given rights of transfer. An open declaration of this policy was made to the gountias by proclamation at Sambalpur in 1862, and settlement operations were then set on foot, but owing to the death of Major Impey, the Deputy Commissioner in 1864, little progress was made. His successor questioned the principles on which the settlement was to be made and a voluminous correspondence ensued which did not close until 1872, and ended in the making of a settlement on a basis different from that of any other in the provinces. In the result it would appear that the principle followed in the settlement was that the proprietary rights which were conferred upon gountias in 1862 were limited to their bhogra lands. Although the order made by Mr. Bowie in 1870, which concerned a dispute between Balmakund Patnaik and another claimant to the proprietary rights in Mauza Sudhamal, in terms purports to confer proprietary rights in that village on Balmakund, it may well be that even before that date such rights had been recognized in the gountias of that village in accordance with a proclamation made in 1862, the terms of which were repeated and confirmed by the Chief Commissioner in a public darbar held at Sambalpur on 9th March 1863. Indeed, the decision of Mr. Bowie appeared to be based upon a consideration of the history of the gountiahi rights acquired by Balmakund's predecessors. However this may be once it is admitted that Balmakund acquired a permanent transferable interest in the property in 1870, in my opinion S. 43, T. P. Act, will apply so that the transfer made before 1870 would operate on the interest which the transferor acquired in property at that date, so as to create in the lessees a permanent transferable interest.

It was contended however that by S. 69, Central Provinces Tenancy Act, 1898, the defendants were liable to be ejected from their holding on the ground that it consisted entirely of *sir* lands. Bhogra land is under the provisions of S. 4 (a), Central Provinces Land Revenue Act, comprised in the term *sir* land, but in my opinion there is nothing in the terms of S. 69, Tenancy Act, from which it may

be inferred that every tenant holding *sir* lands is on that account liable to be ejected. The section itself is introduced in the interest of the tenant and restricts the landlord's right of ejectment except in three cases, one of which is where the ejectment is in execution of a decree passed on the ground that the holding consists entirely of *sir* lands. There are undoubtedly certain cases in which the landlord's right to eject tenants from his *sir* land is recognized, but I can find nothing either in the Land Revenue Act of 1881 or in the Tenancy Act of 1898 restraining the proprietors of such lands from granting permanent leases and where a suit is brought to eject a tenant of bhogra land, there is nothing in S. 69, Tenancy Act, which would bar the defendant from setting up a lease granted by the proprietor himself. In the present case it has been found as a fact that the lease was granted, and in my opinion there is sufficient evidence on the record to justify the finding of the lower appellate Court that the plaintiff's predecessor had a permanent transferable interest which would entitle him to grant the lease in question. In my opinion this appeal must be dismissed with costs.

Mullick, J—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 411

ROE AND ATKINSON, JJ.
Nageswar Prasad—Appellant.

v.

Bachu Singh—Respondent.

Appeal No. 30 of 1917, Decided on 50th January 1919, from the decision of Addl. Sub-Judge, Monghyr, D/- 7th July 1916.

(a) Evidence Act (1 of 1872), Ss. 68 and 70—In Bihar and Orissa scribe must prove his intention of signing as attesting witness.

It is settled law for the province of Bihar and Orissa that a person who signs a document as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness.

[P412 C 2]

(b) Evidence Act (1 of 1872), Ss. 68 and 70—Scribe only attesting witness describing himself as scribe and not witness—In absence of proof that he signed as attesting witness document is unattested.

In order to prove the due execution of a document, proof of attestation is necessary. Where the only witness to a document is the scribe, who deliberately elects to affix the word "scribe" to his name in preference to the word "witness," in the absence of evidence that he signed as an

attesting witness, the document is not admissible in evidence. [P 412 C 2]

(c) **Hindu Law—Alienation—Manager—Debts borrowed for family necessity—Mortgage can be effectively executed.**

Where debts are incurred for family necessity by the execution of mortgage deeds, the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution, would be sufficient to bind that minor and create a lien upon the minor's property. [P 413 C 1]

(d) **Evidence Act (1 of 1872), S. 68—Document must be attested to create lien on property.**

A lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document it is necessary to observe the provisions of S. 68. [P 413 C 2]

(e) **Evidence Act (1 of 1872), Ss. 68 and 70—Manager's admission of execution may bind him but not minor members—Mortgage must be proved against them.**

An extra-judicial admission by the managing member of the family may or may not render it necessary to prove the original documents against himself, but this would not relieve the mortgagee of the necessity to prove them as against the minor. [P 413 C 2]

Kulwant Sahay, Rajendra Prasad and Sivesar Dayal—for Appellant.

Susil Madhab Mullick, Sailendra Nath Palit and Jagganath Prasad—for Respondent.

Roe, J.—This appeal arises from a decree of the Additional Subordinate Judge of Monghyr upon twelve mortgage-bonds, details of which are given in the judgment, as against three members of a Mitakshara joint family: Adit Narain, Daroga and Nageswar Prasad. Included among the defendants is the mother of Nageswar, she being the widow and he the son of one Kuldip Sahai. Kuldip Sahai was, prior to his death in 1909, the managing member of the family, and at his decease Adit Narain became the managing member. Up to 1907 Daroga Prasad was added as a party to the several deeds as a minor under the guardianship of Kuldip Sahai. From 1907 onwards the bonds were executed by Daroga Prasad himself as a major. The last two bonds are dated 1910 and were executed by Adit Narain for himself and for Nageswar Prasad, a minor, and by Daroga Prasad for himself. Of the twelve bonds, seven, being Nos. 9, 11, 16, 17, 18, 20 and 28 of the schedule attached to the judgment, were proved by Mohammed Wali, who had signed as scribe of these documents and no other attesting witness was called. It was contended in the Court below

that these documents could not be adduced in evidence without the calling of an attesting witness. This point was found against the defendants by the learned Subordinate Judge. It was also contended by Daroga Prasad that he was a minor at the time when these documents were executed and further that he did not execute them of his own free will but under coercion from his brother. These points were also found against Daroga Prasad by the learned Subordinate Judge. It was further urged that there had been no proof of the passing of consideration; and that if consideration did pass, then it was not proved that that consideration was for a family necessity. These points were also found against the defendants. In appeal to this Court Mr. Kulwant Sahai argues the case again on the same basis.

With regard to the attestation of these documents, it is specifically admitted in the pleadings by Adit Narain and by Daroga Prasad that these documents were executed by them. Therefore, as against them, no proof of attestation was necessary. The plaintiffs have been put to proof as against Nageswar Prasad of execution of these documents; and it is now settled law for this province that one who signs as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness. The authority for this proposition is to be found in *Ram Bahadur Singh v. Ajodhya Singh* (1). It has been suggested that that was not a judgment of a Divisional Bench, inasmuch as Jwala Prasad, J., did not concur in the ruling of Chamier, C. J., but that matter has been set at rest by the decision of Miller, C. J., and Mullick, J., in Letters Patent Appeal No. 13 of 1917. A scribe who deliberately elects to affix the word "scribe" to his name in preference to the word "witness" places upon himself an almost insupportable burden of proof that he signed as a scribe and not as an attesting witness. In this case, moreover, it is not shown in a single line of the scribe's evidence that he signed as an attesting witness. I hold that he signed as a scribe only and that on his evidence alone the documents are not admissible in evidence. The next point for consideration is the majority or minority of Daroga Prasad at the time

when these documents were executed. Now as the learned Subordinate Judge has pointed out, there could be no motive whatever for any fraud on the part of the mortgagee in obtaining the signature of Daroga Prasad. The debts, as I shall presently show, were all incurred for family necessity and the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution would be sufficient to bind that minor and create a lien upon the minor's property. The fact that mortgagors and mortgagees agreed that these documents should be executed by Daroga Prasad himself suggests strongly that at the time of the execution Daroga Prasad was a major. The evidence to the contrary is of the flimsiest character.

A horoscope has been produced which has not impressed me in the least. A document which purports to be a copy of an extract from a school attendance register has also been produced, and in addition a certificate by the present head master of the school to the effect that when Daroga Prasad was admitted into the school, his age was such that he could not have been a major at the time of the execution of these documents. Now with regard to the register itself it does not seem to me to be admissible in evidence at all, for the reason that it is an entry made by one Raj Kumar Lal, who is alive and within reach of the process of the Court. The certificate given by the head master is also a mere statement made upon hearsay and is peculiarly valueless as evidence, seeing that it is dated 25th July 1914 and was obviously procured solely for the purpose of this case. The learned Subordinate Judge accepted the oral evidence of the plaintiff's witness Nanak Prasad to the effect that Daroga was at the time, when the suit was brought, between 25 and 26 years of age; and it follows that if this evidence be believed, he was at the time of the execution of the documents of age. Upon this point I agree with the learned Subordinate Judge. The documents are therefore binding upon Daroga Prasad, unless he can show that he executed them in circumstances which would render his signature void. Such circumstances have not been shown, and indeed Mr. Kulwant Sahai has not made any attempt to

support Daroga Prasad's allegation of coercion.

The third point for consideration is the passing of consideration. As the learned Subordinate Judge points out, the whole history of the case indicates clearly that consideration passed. Adit Narain, who is now, and has been since the death of Kuldip Sahai, the managing member, admits that consideration did pass. His efforts to obtain a settlement with the mortgagee through Mr. Finch indicate that he recognized that the debts were binding upon the family. I see no reason to differ from the learned Subordinate Judge's finding of fact that consideration did pass. I see also no reason to differ from his finding that the consideration was taken for purposes of the family. In each document this specific purpose was set out. The mortgagee gives evidence that on each occasion on which money was taken he made inquiries as to whether the necessity stated in the bond was an existing necessity. He was not cross-examined upon this point, and we must accept his evidence upon it as unrebutted.

The last question is one as against Nageshwar Prasad, raised through the respondents' vakil, Mr. Sushil Madhab Mullick. The result of the failure of the plaintiff in the Court below to call an attesting witness to the documents is that a decree can be made only against the interests of Adit Narain and Daroga Prasad. But Mr. Mullick contends that inasmuch as the debts were for family necessity and were admitted by Kuldip Sahai in a subsequent mortgage document which has been legally proved, the nature of the debt relieves the mortgagee of the necessity for calling attesting witnesses to the original documents. This proposition I am unable to accept. I concede that the nature of the debt would render the minor liable to discharge it, but I cannot admit that the nature of the debt would create any lien upon the property. A lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document it is necessary that the provisions of S. 68, Evidence Act, be observed. The extra-judicial admission of Kuldip Sahai may or may not render it unnecessary to prove the original documents as against himself. It does not relieve the plaintiff of the necessity to

prove them as against his son. Negeshwar Prasad has not admitted the original documents. We have therefore no cognizance of any instrument creating a lien upon the property of the joint family as against Nageshwar Prasad. In my view therefore Nageshwar Prasad should be relieved from liability under the decree made. Upon the seven documents not legally proved, a decree should be made against Adit Narain and Daroga Prasad for the whole of the sums covered by these seven mortgages and the right, title and interest of Adit Narain and Daroga Prasad brought to sale in execution of the decree so made. Nageshwar Prasad has made no appeal with regard to the five documents not enumerated at an earlier stage of the judgment. He will therefore be bound by the decree made on these five documents. The amount due thereupon will be realized by the sale of the right, title and interest of the whole joint family in the property covered by these five documents. The period of grace in all cases will be six months from the date of this decree, and interest will run at the prescribed rate on the debt only up to the expiry of the period of grace, and thereafter at the Court rate on the whole decree, including costs. I would make no order as to costs in this appeal. The plaintiff will have his costs in the lower Court in proportion to the amount decreed. The defendants will bear their own costs.

Atkinson, J.—I frankly concur in the judgment of the Court which has been delivered by my learned brother. But having regard to the argument which has been addressed to us I desire to add a few brief observations on my own behalf. I consider that the construction of S. 70, Evidence Act, 1872 is accurately and clearly laid down in the considered judgment of Woodroffe, J., in *Satish Chandra Mitra v. Jogendra Nath* (2), and to the law laid down by the authority cited I beg most respectfully to subscribe. Further, I am of opinion that *Abdul Karim v. Salimun* (3) and *Rajmangal Misir v. Mathura Dubain* (4), which decide that an admission, under S. 70, Evidence Act, 1872, to be admissible in evidence can only apply to an admission in fact made in the course of a legal proceeding then

pending before a Court of justice, cannot be supported on principle or authority. If authority were needed to refute such a proposition, I think authority may and can be found in the decision of their Lordships of the Privy Council in *Konwar Doorganath Roy v. Ram Chunder Sen* (5) and also in *Hampden v. Wallis* (6) and also in *Gobardhan Das v. Hori Lal* (7).

In my opinion an admission under S. 70 is admissible in evidence, even though it be an admission not made in the course of legal proceedings then pending before a Court of justice, but which may be an admission made antecedent to the institution of legal proceedings. This construction of S. 70, Evidence Act, as to what constitutes an admission to be admissible in evidence is in harmony with the definition of an admission contained in Ss. 17 to 20 inclusive of the Evidence Act itself, and is in accordance with the general legal principle.

V.S./R.K. *Decree modified.*

(5) [1876] 2 Cal. 341=4 I. A. 52=3 Sar. 681 (P. C.).

(6) [1884] 27 Ch. D. 251.

(7) [1913] 35 All. 264=19 I. C. 121.

A. I. R. 1919 Patna 414

ROE AND JWALA PRASAD, JJ.

Rampal Ram—Appellant.

v.

Suba Singh—Respondent.

Second Appeal No. 1041 of 1917, Decided on 31st January 1919, from decision of Dist. Judge, Shahabad, D/- 22nd August 1917.

Evidence Act (1 of 1872), Ss. 102 and 103.
—Suit for balance of price—Property and deed in possession of vendee—Mere denial of receipt does not shift burden of proof of consideration on defendant.

Where the plaintiff in a suit to recover the balance of consideration due on a sale sets up a definite agreement that the balance with interest was to be paid on a particular date, the burden of proving the alleged agreement rests upon the plaintiff. He must establish at least a prima facie title to the relief which he seeks, more especially where the vendee property as well as the sale-deed have been given in possession to the defendant. Mere denial of the receipt of consideration is not sufficient to relieve the plaintiff and to shift the burden on to the vendee defendant. [P 415 C 2]

Kulwant Sahay and Raghunath Singh—for Appellant.

Naresh Chandra Singh—for Respondent.

(2) [1916] 44 Cal. 345=34 I. C. 862.

(3) [1900] 7 Cal. 190=14 Ind. Dec. (n. s.) 125.

(4) [1916] 28 All. 1=30 I. C. 576.

Jwala Prasad, J.—The plaintiff is the appellant. He executed a kabala, dated 3rd February 1913, in favour of defendant 1 in the name of his son, defendant 2 purporting to sell 13 bighas 19 kathas of his kasht land in village Bahira, pargana and thana Arrah, for Rs. 1,400. On 2nd February 1916 the plaintiff brought a suit out of which this appeal has arisen, in the Court of the Munsif of Arrah for recovery of Rs. 619 as part of the consideration money with interest due under the said kabala. The plaintiff's case was that out of Rs. 1,400, the consideration money of the kabala, he had received Rs. 601 on different occasions and got receipts granted therefor, and as regards the balance of the consideration money the defendant had promised to pay with interest at 1 per cent per month and that the possession of the land sold was made over to the defendant and that subsequently the sale deed was lost from the basta of one Munshi Brij Kishore Sahay, to whom it was handed over for preparing an ekrarnama, and that the plaintiff afterwards came to know that the defendant had got surreptitiously the possession of the said sale deed, and when the plaintiff demanded from the defendant the balance of the consideration money he (defendant) paid Rs. 180 by several instalments, but did not pay the rest. The cause of action mentioned in the plaint is 15th April 1915, when the date of payment expired. The defendant resisted the claim of the plaintiff, denying that anything was due to the plaintiff under the kabala and asserting that after the registration of the kabala the plaintiff brought it from the registration office, went to the defendant and made demand for the consideration money, and that the defendant then and there paid the entire consideration money to the plaintiff in one lump sum and the plaintiff made over the kabala to the defendant. The Munsif decreed the plaintiff's suit, holding that the full consideration of the kabala was not paid. On appeal the District Judge reversed the decree of the Munsif and dismissed the plaintiff's suit.

The learned District Judge disbelieved the account given by the plaintiff as to how the defendant came to be in possession of the sale deed in question. The learned District Judge has held that the defendant vendee was in possession of the land and had the sale certificate and the

sale deed. He has disbelieved the evidence on both sides, namely the evidence given by the plaintiff as to his not having received the consideration money in full and that given by the defendant as to the entire amount having been paid in one lump sum. The learned Judge has dismissed the suit upon the ground that a strong presumption of the full price having been paid to the plaintiff may be raised from the fact that the defendant was in possession of the land and the title-deeds. The question in this appeal is whether the District Judge is wrong in law in raising the presumption that he has done. It is said that the learned Judge himself has destroyed the presumption by holding that two small payments were made—one on 11th March 1913 and the other on 26th March 1913—which negative the theory of the defendant of a single payment of Rs. 1,400 in a lump sum.

No doubt upon the finding of the Judge the case of the defendant of having paid the entire amount of Rs. 1,400 in one lump sum as asserted in para. 13 of his written statement must fail. If therefore the onus lay upon the defendant to prove the payment made by him, the plaintiff is entitled to succeed, but the onus of proving the case, as set forth in the plaint, lay upon the plaintiff in this case. He definitely stated that there was an agreement entered into by the defendant to pay the balance of the consideration money, with interest at the rate of one per cent per month, on a particular date, namely 15th April 1915, mentioned as the date on which the cause of action is said to have arisen: vide para. 8 of the plaint. The burden of proving the allegations must, on general grounds, rest upon the plaintiff. The sale deed is a registered document and recites that the consideration of the deed was paid. This of course, does not help either side, because, according to the case of both the parties at the time when the recital was made, the consideration did not pass, and it was of course open to the plaintiff to show that the entire consideration money was not paid: *Sah Lal Chand v. Indarjit* (1). Even if the defendant had to prove the passing of the consideration, the subsequent events, namely the vended property having been given in possession to

(1) [1900] 22 All. 370 = 27 I. A. 93 = 7 Sar. 702 (P. C.).

the defendant as well as the sale certificate and the sale deed in question, shifted the burden upon the plaintiff to show that he parted with the land and the title deeds without having received the entire consideration money. The attempt of the plaintiff to show that the sale deed had passed surreptitiously to the defendant has failed, and hence no onus lay at any stage or was ever shifted upon the defendant. From the case of *Kaleepershad Tewaree v. Rajah Sahib Pershad Sein* (2) it may be easily deduced that it is too wide to affirm that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burden of proving the payment of that consideration, and that the plaintiff who wishes to set aside a contract under which there has been possession and enjoyment, and of which there has been performance, has the burden upon him of establishing at least a good prima facie title to the relief which he seeks. I therefore hold that the burden in this case of establishing the allegations set up in the plaint rested upon the plaintiff. According to the finding of the Judge the plaintiff has not proved his case.

As to the presumption raised by the Court it was competent to the Court below to presume that the consideration money had been paid when the land was parted with and the title deeds were made over to the defendant. This is a presumption arising from the ordinary course of human conduct in transacting worldly business. The question of presumption is a matter of inference from certain facts, and when once the Court draws a presumption it becomes a question of fact, and I do not think that it is competent for this Court to hold that the Judge was wrong in law in raising the presumption that he did in favour of the plaintiff. The result is that the judgment of the Court below is upheld and the appeal is dismissed with costs.

Roe, J.—I agree.

V.S./R.K.

Appeal dismissed.

(2) [1867-69] 12 M. I. A. 282=2 Sar. 429.

A. I. R. 1919 Patna 416

MULLICK, J.

Sheo Ghulam Sahu—Complainant—Petitioner.

v.

Kheyali Thakur — Accused—Opposite Party.

Criminal Revn. No. 290 of 1918, Decided on 27th August 1918, against order of Sess-Judge, Mozufferpore, D/- 12th July 1918.

(a) Criminal P. C. (1898), S. 195—Sanction for prosecution must state offence and Court where it was committed.

In giving sanction for the prosecution of a person for an offence, the Court should, as far as practicable, state the offence in respect of which the prosecution is sanctioned and also specify the Court where it was committed.

Where an order granting sanction for the prosecution of the accused ran as follows: "Record seen. Sanction allowed."

Held: that this was not a substantial compliance with the letter of the law.

[P 417 C 1]

(b) Penal Code (1860), Ss. 193 and 211—Sanction granted for prosecution under S. 193—No proceedings can be sustained under S. 211.

If a sanction is granted for prosecution under S. 193, proceedings in respect of an offence under S. 211 of the Code cannot be sustained.

[P 417 C 1]

Atul Krishna Ray—for Petitioner.

P. K. Sen and Jalgovind Singh—for Opposite Party.

Judgment.—This is an application which arises out of a sanction alleged to have been given by the Subdivisional Magistrate of Sitamarhi for the prosecution of the petitioner Sheo Ghulam. It appears that Sheo Ghulam lodged a complaint before the Subdivisional Magistrate charging one Kheyali Thakur with criminal breach of trust in respect of certain ornaments. The case was tried and Kheyali was acquitted and the learned Subdivisional Magistrate, holding that the complaint was frivolous, and vexatious directed the complainant Sheo Ghulam to pay Rs. 50 as compensation to the accused Kheyali. A few days later Kheyali not satisfied with this, applied for sanction to prosecute Sheo Ghulam for perjury, setting out in his petition various statements alleged to be false. On this petition the Subdivisional Magistrate made the following order:

"Record seen. Sanction allowed."

The case then went before a Deputy Magistrate who has issued process against Sheo Ghulam, not under S. 193, I. P. C., but under S. 211, I. P. C. Now accepting

the general proposition that where a Court has a discretion to give sanction under S. 195, Criminal P. C., that discretion is not to be crystallized or unduly restricted provided the Court is astute to see that there is no abuse of the administration of criminal justice. I think that in this case there has not been a substantial compliance with the letter of the law. The law requires that the Court shall, as far as practicable, state the offence in respect of which the prosecution is sanctioned and also specify the Court where it was committed. Taking the petition with the order of the Sub-divisional Magistrate, it is impossible to find for what particular offence the sanction has been given. Assuming that it is for an offence under S. 193, I. P. C., it is clear that the proceedings in respect of the offence under S. 211 cannot be sustained. It may be urged that all that has to be done is to direct the trying Court to proceed to the trial of the accused for an offence under S. 193, I. P. C. and to abandon the charge under S. 211, I. P. C. but having regard to the fact that the petitioner has already paid Rs. 50 as compensation, I do not think that it is necessary that I should order the proceedings to continue. The trial of the petitioner under S. 211, I. P. C., is, in my opinion, illegal and he must be discharged under S. 250, Criminal P. C., in respect of that offence. In respect of the offence under S. 193, I. P. C. both on the ground above mentioned as to the order under S. 230, Criminal P. C. and on the ground that the evidence in the case does not show conclusively that the charge was intentionally false, the sanction must be revoked.

V.S./R.K.

*Sanction revoked.***A. I. R. 1919 Patna 417**

DAWSON-MILLER, C. J. AND MULLICK, J.
Banamali Satnathi—Petitioner.

v.

Artaran Mahapatra—Opposite Party.
Civil Revn. No. 23 of 1918, Decided on 19th December 1918, from order of Munsif, Kendrapara, D/- 15th May 1918.

(a) **Behar and Orissa Tenancy Act (2 B. O. of 1913), Ss. 193 and 210**—"Court having jurisdiction to determine suit for possession of land"—Civil Court is included.

The provisions of S. 210 are general in their application and the words "the Court having jurisdiction to determine a suit for the posses-

sion of land" in the section mean any Court which has that jurisdiction, unless it can be shown that that jurisdiction is taken away by some provision in the Act itself. [P 418 C 1]

(b) **Behar and Orissa Tenancy Act (2 B. O. of 1913), S. 210 (1) (d)**—Civil Court can determine rent payable by a tenant.

A civil Court has jurisdiction to determine the rent payable by a tenant under S. 210 (1) (d). [P 418 C 1]

B. Chowdury—for Petitioners.

B. N. Das—for Opposite Party.

Dawson-Miller, C. J.—The question for decision in this case is whether a civil Court is a Court having jurisdiction to determine a suit for the possession of land within the meaning of S. 210, Orissa Tenancy Act, 1913. That section provides that such a Court, on the application of either the landlord or the tenant, may determine all or any of the following matters namely: "(d) the rent payable by him at the time of the application." An application was made under that section to a civil Court presided over by a Munsif and the Munsif came to the conclusion that the rent payable was that contended for by the landlord, which was Rs. 7 odd and not that contended for by the tenant, which was Rs. 3 odd. That decision is brought before us by way of revision and we are asked to say that the Munsif's Court had no jurisdiction to entertain such an application, and we are referred to S. 193 of the Act which provides that:

"The following suits and applications shall be cognizable by the Collector and shall be instituted and tried or heard under the provisions of the Act, and shall not be cognizable in any other Court except as provided in this Act, namely, '(a) all suits and applications under any portion of this Act other than Chapter 11'."

The application in question admittedly did not come under Ch. 11 and therefore prima facie it would be under S. 193, one of the applications which would be triable by the Collector only and not by the civil Court; but S. 193 only provides that these suits and applications shall not be cognizable in any other Court except as provided in this Act, and the question which we have to determine here is, whether it is provided in S. 210 that a civil Court shall have jurisdiction to determine one of the applications mentioned in that section. The section itself is quite clear and unambiguous. It is taken and repeated verbatim, I believe, from S. 158, Ben. Ten. Act. It refers to the Court having jurisdiction to determine a suit for the

in spite of an arrangement previously prevailing whereby the cosharers collected their rent separately. Such an arrangement, their Lordships say, merely affected the right to sue separately, that is without joining the other cosharers, but in no other respect modified the terms of the holding. It followed therefore that the right to bring the tenure to sale remained intact. In my opinion it follows a fortiori from that decision that under the law, as it then stood, a cosharer could bring a similar suit even though the collection had been joint. Meanwhile, as I have said, the Indian legislature had placed S. 148-A and S. 158-B on the Statute Book; S. 158-B, in order to benefit cosharer landlords who collected their rents jointly, and S. 148-A to include those who collected separately and were therefore not in a position to know whether the rents payable by the tenants to other cosharers had been in fact paid or not. It is unnecessary for us to consider whether these sections have in any way affected the general principles of legal procedure laid down by the Privy Council as applying to such suits, for we can decide the appeal before us on S. 148-A itself.

I am of opinion that the essential principles underlying that section are (1) that the suit should, in form, be for the whole rent and in substance for the separate share of rent in arrears; (2) that the whole body of landlords are impleaded, with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent due must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded cosharers appear and claim any arrears as due to themselves. If his belief is accurate the Court will give him a decree for his share of the rent only as being the entire rent due; if inaccurate, the Court will investigate and decree the arrears due to the impleaded cosharers as well.

These are obviously the principles underlying the decisions in *Nunda Lal v. Kala Chand* (2), in which it was held that the plaintiff must be examined to

find its intention, and the decision in *Brohmanand Nath Deb Sircar v. Hem Chandra Mitra* (6), in which it was held that a very similar plaint to the one before us substantially complied with the requirements of S. 148-A inasmuch as the rent due under that section does not mean the entire rent payable on the original contract or lease. It may be the whole of the rent payable if the whole happens to be in arrears, it may include the arrears of the plaintiff and the known arrears of his cosharers, it may, on the other hand, turn out to be only the arrears due to the plaintiff himself. If the plaint in spirit and intention complies with the essential requirements which I have laid down above I hold it would be unfair to defeat the plaintiff because of its inartistic draftsmanship, for the section itself is not too artistic in its draftsmanship.

Now in this case the plaint in para. 7 as set out above and in its two prayers has in my view clearly satisfied the essential requirements of S. 148-A. With regard to the decision in *Baikantha Nath Sen v. Ramapati Chatterjee* (1) we are of opinion that it is distinguishable. Mukerjee, J., at p. 103 (of 27 C. L. J.) says:

"But it is plain that if a plaintiff seeks to avail himself of the special provisions of S. 148-A, he must in his plaint seek to recover the entire amount due to himself. This the present plaintiff has failed to do."

It was obviously a decision on its own facts, and in no way touches the principles on which the earlier cases in Calcutta were decided and the principles on which the decision in this case also will rest. For these reasons I am of opinion that the order of the learned District Judge decreeing the suit was right, and that the appeal fails and should be dismissed with costs.

Atkinson, J.—I entirely agree with the judgment of my learned brother.

V.S./R.K. *Appeal dismissed.*

(6) A. I. R. 1914 Cal. 910=23 I. C. 981.

A. I. R. 1919 Patna 420

ROE AND CHAPMAN, JJ.

Benudhar Panda—Decree-holder—Appellant.

v.

Kangoi Krishna Chandra Das—Judgment-debtor—Respondent.

Appeal No. 41 of 1917, Decided on 11th April 1918.

(a) Civil P. C. (5 of 1908), S. 97—Preliminary decree—Finality.

A preliminary decree is final if no appeal is filed against it. [P 422 C 1]

(b) Civil P. C. (5 of 1908), S. 97—Mortgage suit—Preliminary decree not appealed against—Rate of interest, even if higher, cannot be questioned at time of final decree.

In a mortgage suit the parties agreed to a particular rate of interest, such rate being in excess of the rate given in the bond. The Court passed a preliminary decree embodying this rate of interest and no appeal was filed against the decree, but when the mortgagee applied for a decree absolute, the mortgagor objected to the rate of interest as being in excess of the rate claimed in the plaint and questioned the jurisdiction of the Court in allowing such rate:

Held: that the Court had jurisdiction to increase the rate of interest, that it was at liberty to make an order for the payment of interest at any rate that seemed suitable, and that as no appeal had been filed against the preliminary decree, the order fixing the rate of interest could not be questioned in any subsequent proceeding.

[P 422 C 1]

Baikuntha Nath Dutt—for Appellant.

Sarat Chndra Mukherji—for Respondent.

Roe, J.—The facts of this case are that the appellant before us was a mortgagor against whom a suit had been instituted to enforce a mortgage. The suit was compromised, the terms being that the sum alleged to be due on the date of the compromise was reduced from something over Rs. 3,000 to Rs. 2,200, and the rate of interest given in the bond increased from Rs. 1-9-0 per cent. per mensem to Rs. 3 2-0 per cent. per mensem. Not only was this contract in regard to the increase of the rate of interest clearly set forth in the petition of compromise, it was also mentioned in unequivocal terms in the decree made upon the compromise. No appeal was laid against the preliminary decree; but when the mortgagee came to Court for a decree absolute and the sale of the property upon the taking of an account, the mortgagor-judgment-debtor objected that the interest agreed upon in the compromise was in excess of the rate claimed in the plaint, and that the preliminary decree made providing for interest at that rate was outside the jurisdiction of the Court making the decree. He therefore asked the Court in drawing up an account preliminary to the sale to reckon the interest at the rate of Rs 1-9-0 per cent only. The Court of first instance accepted the contention of the judgment-debtor. This decision was confirmed by

the District Court in appeal. The mortgagee-decree-holder therefore appeals to this Court upon the ground that there having been no appeal against the decree made upon the compromise, the Court, in drawing up the account necessary to the sale, was bound by the terms of the preliminary decree. Two authorities have been quoted, decisions of this Court, in support of the respondent's contention, as against the whole body of authority that a preliminary decree is final, if no appeal is filed against it. The case quoted by the respondent is *Rai Brij Raj Kishun v. Rameshwar Singh* (1). I am unable to see that this decision is of assistance to the respondent. All that was done in that case was to make a provision in the final decree for interest at the Court rate from the date fixed for payment in the preliminary decree, in spite of the fact that there had been no provision made for interest in the preliminary decree beyond the date fixed for payment.

This order was in accordance with the practice of the Calcutta High Court on the original side as reported by the Registrar, Mr. Belchambers, in the note annexed to the case of *Achalabala Bose v. Surendra Nath Dey* (2). R. 324 provides that unless the Court shall otherwise order, the decree shall direct that the defendant do pay interest at the rate of 6 per cent per annum. This rule received the approval of the Judicial Committee in *Sundar Koer v. Rai Sham Krishen* (3). The second case quoted is a decision to which I was a party: *Gauri Dutt v. Dohan Thakur* (4). In that case it was not argued that the Court in the circumstances of the case had no power to go behind the original decree; I must assume that there were in that case facts which precluded that argument. In the case before us there is a distinct order in the decree that the rate of interest shall be at Rs. 3-2-0 per cent. per mensem; and the sole question for our decision is whether that decree can now be ignored. Referring again to the case of *Sundar Koer v. Rai Sham Krishen* (3), their Lordships say that they "think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an ag-

(1) [1917] 39 I. C. 925.

(2) [1897] 24 Cal. 766.

(3) [1907] 34 Cal. 150=31 I. A. 9 (P.C.).

(4) [1913] 2 P. L. J. 673=43 I. C. 459.

gregate amount to be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of the judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree."

In conformity with this decision the Courts in India have almost invariably lightened the burden of the mortgagor by fixing a rate of interest subsequent to the date of payment at something less than the bond rate, and their power to do so has never been challenged. It seems to me impossible to say that the Court has jurisdiction to decrease the rate stipulated for in the bond but has no power to increase it. I am of opinion that the Court, when passing the preliminary decree in the case before us, was at liberty to make an order for the payment of interest at any rate that might seem suitable; and I am further of opinion that if no appeal was made against the order fixing the rate of interest, then that order became final and should not be questioned in any further future proceeding. I would therefore set aside the decree made by the Courts below and direct that execution be taken directly in accordance with the decree made. In the circumstances of the case I would make no order as to costs.

Chapman, J.—I agree.

V.S./R.K.

Decree set aside.

A. I. R. 1919 Patna 422

CHAPMAN AND ROE, JJ.

Satya Charan Chandra—Plaintiff—Appellant.

v.

Satpir Mahanty—Defendant—Respondent.

Appeal No. 22 of 1917, Decided on 12th April 1918, from appellate decree of Dist. Judge, Cuttack, D/- 12th December 1916.

Hindu Law — Debts—Father—Father becoming surety for stranger's crime — Suit decreed against father,—Sale of family property—Sons' share is not liable—Security for another's crime being illegal debt.

The father of a Mitakshara family became surety for a stranger and pledged the family property against any money misappropriated by the latter in the discharge of certain duties. On a failure by the stranger to account for certain moneys entrusted to him, a suit was brought against the father and a decree obtained for the amount embezzled. In execution of the decree the whole of the family property was sold, whereupon the sons brought the present suit for

a declaration that by the auction-purchase the share only to which the father would have been entitled on partition passed by the sale;

Held: that the suit must succeed, as the debt incurred by the father in becoming security for another's crime was, in the eye of Hindu law, an illegal debt as affecting the liability of the sons therefor and could not be enforced against them.

[P 423 C 2]

Satya Narain Sen Gupta—for Appellant.

Damodar Kar and B. N. Das—for Respondent.

Roe, J.—The appellant in this case is a decree-holder, who in execution of his decree against the father of a Mitakshara family purchased the whole property of the family. The sons brought the present suit for a declaration that by the auction-purchase the share only to which the father would have been entitled on partition passed by the sale. The Courts below decreed their suit, on the ground that the debt for which the father's share was sold was not an antecedent debt incurred by himself, but a liability incurred in a surety bond given by him for the good behaviour of a stranger as Tahsildar to the decree-holders. In appeal it is argued that the lower Courts were not competent to go into the question of the nature of the debt beyond an inquiry as to its illegality or immorality, and in this regard the decision in the case of *Sripat Singh Dugar v. Maharaja Sir Prodyot Kumar Tagore* (1) was quoted. We do not propose to dispute for a moment the suggestion that this decision contains a clear exposition of the law that where a property has been sold in execution of a decree against the father, and where it is clear upon the whole of the proceedings in the Court making the decree that the decree was made against the whole joint family property, the sons can only succeed on showing that the debt upon which the decree was made was taken for illegal or immoral purposes. But in the case before us it will be observed that prior to the passing of the decree there was no debt due from the father of this family at all, and in the second place, when the debt did fall due, that is to say, when the party for whom the father stood surety failed to make good the sum misappropriated by him, the Courts were required to ascertain whether the debt was an illegal or immoral debt.

(1) A. I. R. 1916 F. C. 220=44 Cal. 524=44 I. A. 1=39 I. C. 252 (P. C.).

It is not of course an immoral debt, but in the view taken by Chatterjee, J., in Appeal from Appellate Decree No. 3811 of 1910 of the Calcutta High Court the debt incurred in the circumstances in which the appellant has obtained his decree is an illegal debt, and this view is not inconsistent with that taken in the decision of Mookerjee, J., in *Chakouri Mahton v. Ganga Proshad* (2). The point under discussion in the latter case was whether a debt incurred by a criminal action was an illegal debt, and it was decided that the act under which the liability was incurred in that case amounted to a civil tort and not to a criminal act, and that therefore the debt was not an illegal debt. There can be no doubt upon the text that the sons are not liable for a liability incurred by a father's crime. There can be no doubt also that a Hindu father is not allowed by the text to stand surety pledging himself to bear the consequences of another's crime. There are three kinds of sureties mentioned in the text: (1) surety for appearance, (2) surety for good behaviour, and (3) surety for money. The action of the father in standing surety for good behaviour and pledging the property of the family for good behaviour of the stranger would be in the eye of the Hindu law unlawful as affecting the son. This point was developed by Chatterjee, J., in the case to which I have referred, and it seems to me an easy step in deduction to say that if a father's debt, incurred by his own breach of the law, is an illegal debt, then the father's debt, incurred by a stranger's breach of the criminal law, is also an illegal debt. It is however contended before us that the debt upon which the present decree was made was not necessarily a debt incurred by the criminal action of a stranger. The Courts below have concurred in finding as a fact that the surety bond given was a security against embezzlement. The translation of the phrase creating a lien on the property of the family shows that this is a correct construction. That phrase runs:

"If the Tahsildar fails to make good the money which may be found due from him after the rendition of accounts, then the said Babu will be at liberty to realize the amount so misappropriated from the properties mortgaged by way of surety."

This seems to me to be a provision solely against the taking of money in cir-

cumstances which would amount to criminal misappropriation. In my view it was unlawful for a father to stand surety for such moneys and the debt incurred by him in so standing surety was an illegal debt. I would therefore dismiss this appeal with costs.

Chapman, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 423

DAS, J.

Tafazul Khan and another — Defendants—Appellants.

v.

Dr. Mohammad Bakshi Khan and another — Plaintiffs and Defendants — Respondents.

Second Appeals Nos. 11 and 12 of 1919, Decided on 14th July 1919, from order of Offg. Dist. Judge, Patna, D/- 16th September 1918.

(a) **Limitation Act (9 of 1908), Art. 48—Suit to recover price of materials of house misappropriated — Limitation commences from date of knowledge of possession.**

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period of limitation prescribed by Art. 48, and time begins to run from the date when the plaintiff first learns in whose possession the materials are.

[P 424 C 1]

(b) **Limitation Act (9 of 1908), Art. 144—Suit for possession and mesne profits and for correction of entry in Record of Rights — 12 years' rule applies.**

A suit for possession and mesne profits in which the plaintiff asks for a declaration that an entry in the Record of Rights is incorrect is governed by the 12 years' rule of limitation.

[P 424 C 1]

Siva Narain Bode—for Appellants.

Fakhruddin—for Respondents.

Judgment.—I think the lower Appellate Court is right in the view which it has taken on the question of limitation. Miscellaneous Appeal No. 11 of 1919 arises out of Suit No. 204 for possession of a portion of a house and the price of materials alleged to have been removed by the defendants. The Record of Rights was finally published on 10th June 1910. Therefore the plaintiff must be presumed to have been in possession on 10th June 1910. The suit was instituted on 9th July 1917. Therefore the suit for possession of a portion of the house was clearly within time.

So far as the suit for materials is concerned, the question for my determination is whether Art. 48 or Art. 49, Lim. Act applies. Art. 48 applies to

suits for specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion. Art. 49 applies to a suit for specific moveable property not falling within Art. 48. It will be noticed that Art. 49 is a general section and it will apply unless it is clearly established that the case comes under Art. 48. It is therefore necessary to examine the plaint in order to see whether the case comes under Art. 48. In my opinion, the plaint makes a definite case of conversion. I hold therefore that Art. 48 applies and that the plaintiff is entitled to bring his suit within three years from the date when he first learns in whose possession the property is. The plaintiff says that he came to know of the illegal acts of the defendant on 31st May 1915. The suit, having been filed on 10th July 1917, is clearly within time.

On these findings Miscellaneous Appeal No. 11 of 1919 must be dismissed with costs. I now come to Miscellaneous Appeal No. 12 of 1919. The only point that has been argued before me is that the suit is in substance a suit for the correction of an entry in the Record of Rights and that therefore the suit not having been brought within six years from the date of the final publication of the Record of Rights is barred by limitation. I cannot agree that the suit is in substance a suit for the correction of an entry in the Record of Rights. The suit is a suit for possession and mesne profits, though the plaintiff has asked for a declaration that the entry in the Record of Rights is incorrect. It is well settled that the 12 years' rule applies to a suit of this nature. The suit is therefore within time. I would dismiss Miscellaneous Appeal No. 12 of 1919 with costs. It must be distinctly understood that for the purpose of these decisions I have assumed that every allegation in the plaint is correct. I have come to the conclusion that on the allegations made in the plaint the plaintiffs' suits are not barred by limitation. It is, of course, still open to the trial Court to hold on evidence that the plaintiff's suits are barred by limitation, but it must, of course, be guided by the principles which I have laid down in this judgment.

V.S./R.K.

*Appeals dismissed.***A. I. R. 1919 Patna 424**

ATKINSON AND DASS, JJ.

Thakur Singh—Judgment-debtor—Appellant.

v.

Sheo Bhanjan Singh—Decree-holder—Respondent.

Appeal No. 240 of 1918, Decided on 12th February 1919, from decision of Dist. Judge., Gaya. D/- 6th June 1916.

Limitation Act, (1908), Art. 182, Cl. (5)—Affidavit in proof of service of attachment is a step-in-aid

An affidavit sworn and filed on behalf of the decree-holder in proof of service of attachment process is a step-in-aid of execution. [P 425 C 1]

Ganesh Dutt and Sivanandan Roy—for Appellant.*Kailaspati*—for Respondent.

Judgment.—This miscellaneous appeal comes before us from an order of Mr. Foster, District Judge of Gaya, dated 8th of June 1916. The facts out of which this appeal arises are very short. The plaintiff, an execution creditor, obtained a decree against the defendant in Original Suit No. 46 of 1911, and he issued execution on foot of this decree. The first application for execution ended in a nullity on 13th July 1914. The present application for leave to issue execution was presented on 16th August 1917. It is contended on behalf of the judgment-debtor, who is the appellant before us that inasmuch as three years have elapsed since the termination of the first execution proceeding, that the present application for leave to issue execution is barred by limitation of time. This would appear to be so unless during the intervening period between the termination of the first execution and the presentation of the petition for leave to issue the present execution a step had been taken in aid of execution. It is alleged in this case by the decree-holder that a step was taken in aid of execution by him on 2nd September 1914. Both the lower Courts have yielded to the argument addressed to them on behalf of the decree-holder and have found as a fact that a step-in-aid of execution was taken by the decree-holder on 2nd September 1914, and they have held that the present application for leave to issue execution which was dated 16th August 1917 is not consequently barred.

With the opinion expressed by both the lower Courts we entirely agree and we base our decision in this miscellaneous

appeal mainly upon the finding of fact arrived at by the learned Subordinate Judge, Mr. Bose. We think that this finding of fact is conclusive, namely that on 2nd September evidence was given by affidavit by the decree-holder by a peon in proof of service of the notice of attachment upon the judgment-debtor. This was an essential fact to be proved before the execution could possibly proceed to its further stages. The learned Subordinate Judge says;

"I find that on 2nd September 1914 an affidavit was sworn and filed on behalf of the decree-holder in proof of service of attachment process."

If this fact be true and we believe it is clearly in point of law it amounts to a step-in-aid of execution and if authority were needed for this proposition, it will be found in the case reported as *Pran Krishna Das v. Pratap Chandra Dalai* (1), in which case the learned Judges held that the filing of an affidavit in proof of service on a judgment-debtor of a notice issued under O. 21, R. 21, Civil P.C. was a step taken in aid of execution. The same principle, it appears to us applies to the present case. Accordingly we are of opinion that the decisions of the learned District and Subordinate Judges were right in law and we dismiss this appeal with costs, measured at three gold mohurs.

V.S./R.K.

Appeal dismissed.

(1) [1917] 38 I. C. 536.

A. I. R. 1919 Patna 425 (1)

ROE, J.

Barkatunnissa Begum—Appellant.

v.

Qamarunnissa—Respondent.

First appeal No. 168 of 1918, Decided on 9th August 1918.

Court Fees Act (7 of 1870), S. 7 (9)—Appeal to set aside decree absolute in mortgage suit on ground of non-joinder of necessary parties in preliminary decree—Court-fee payable is ad valorem.

Where an appeal was filed to set aside the final decree in a mortgage suit, on the ground that the preliminary decree should not have been made absolute inasmuch as all the necessary parties were not parties to the preliminary decree.

Held, that the memorandum of appeal must bear ad valorem Court-fee, inasmuch as the object of the appeal was to get the whole decree set aside. [P 425 C 2]

Facts.—In a mortgage suit a preliminary decree was preferred, in which the name of one of the necessary parties to the suit was omitted by mistake. An attempt was made to rectify the mistake,

but without success. Subsequently the preliminary decree was made absolute. An appeal was preferred to the High Court against the absolute decree and the main ground taken in the appeal was that the preliminary decree should not have been made absolute since all persons interested in the mortgage had not been made parties to it, as required by O. 34, R. 1, Civil P. C. The memorandum of appeal was stamped with the Court-fee of Rs. 10 only. The Stamp Reporter submitted that the appellant should have paid ad valorem Court-fees. Before the Taxing Officer Mr. Kailaspati, for the Appellant, contended that since the appellant had not objected to the amount of the decree but had objected only to the omission of a necessary party, it was impossible to estimate the value of the appeal and so under Sch. 2, Art. 17, Court-fees Act a stamp of Rs. 10 was sufficient. He relied on *Dadnoo v. Somnath* (1).

The Taxing Officer agreed with the Stamp Reporter, but considering the point to be of some importance referred the case to the Taxing Judge. In the course of his order of reference he observed that the object of the appellant was to set aside the whole of the final decree and as such he should have paid ad valorem Court-fee. He referred to *Bajrangi Lal v. Mahabir Kunwar* (2) to show that at least in Allahabad the practice was to pay ad valorem Court-fees in such cases.

Judgment.—I have no doubt at all that the relief sought by the applicant is to set aside the final decree upon the mortgage; obviously therefore the ad valorem fee must be paid.

V.S./R.K.

Order accordingly.

(1) [1911] 7 N. L. R. 41=10 I. C. 736.

(2) [1913] 35 All. 476=21 I. C. 493.

** A. I. R. 1919 Patna 425 (2)

Full Bench

ATKINSON, COUTTS AND MANUK, JJ.

Raghunandan Prosad Misra—Petitioner—Applicant.

v.

Ramcharan Manda—Opposite Party..

Civil Revn. Nos. 111 and 112 of 1918, Decided on 20th December 1918, from order of Munsif, Monghyr.

**** (a) Civil P. C. (1908), O. 21, R. 97—Auction-purchaser other than decree holder—Resistance to possession—He can apply for**

fresh writ of possession without applying under R. 97.

An auction-purchaser, who is not the decree-holder, having made an application for delivery of possession and that application having been infructuous by reason of obstruction, is entitled to make an application for a fresh writ of possession within the period of limitation allowed for such an application without applying under R. 97, O. 21. [P 430 C 1]

(b) Civil P.C., (1908) S. 115—Other remedy open—Interference in revision is not allowed except for special reasons where such interference terminates litigation.

Per *Atkinson and Coutts, J.J.*—It is the general rule of practice that a High Court will not interfere in revision in any case in which the petitioner has another remedy, except in very exceptional circumstances. [P 430 C 1]

Per *Manuk, J.*—When a High Court can, by interfering under S. 115 in appropriate cases, terminate the litigation, the mere fact that another remedy by suit only lies should not be a reason for non-interference. [P 430 C 2]

Kulwant Sahai--for Applicant.

Shoroshi Charan Mitter--for Opposite Party.

Coutts, J.—This application for revision has been referred to us for disposal after decision of the question whether an auction-purchaser who is not the decree-holder, having made an application for delivery of possession and that application having been infructuous by reason of obstruction of persons whom the auction-purchaser alleged to be creatures of the judgment-debtor, is entitled to make a fresh application for delivery of possession.

The application is by the auction-purchaser at a sale in execution of a rent decree. The rent decree was passed on 22nd February 1917 in favour of the opposite parties Nos. 4, 5 and 6 against the opposite parties Nos. 1, 2 and 3; execution was taken out and sale proclamation issued. On 14th July 1917 the holding was sold and purchased by the present petitioner for Rs. 200. The opposite parties Nos. 7 and 8, Chandi and Giridhari, applied to set aside the sale on the ground that they were the purchasers in execution of a mortgage decree against the tenants of a portion of the holding, the purchase being prior to the date of the sale in execution of the rent decree. This application was rejected on 17th November 1917 and the sale to the present petitioner was confirmed on the same date. The sale certificate was granted to the petitioner on 20th November 1917 and on 19th February 1918 he applied for delivery of possession under

O. 21, R. 95. On 22nd February a peon was sent to deliver possession but returned the writ of delivery of possession on the same day with the report that he had been resisted by Chandi, Giridhari and several others. On the same day the petitioner auction-purchaser complained of the resistance and asked for sanction to prosecute. On 23rd February he made a fresh application for delivery of possession, praying at the same time for the deputation of the nazir and for police help.

On the same date the Court ordered the issue of a fresh writ. On 25th Chandi filed an application objecting to the issue of a fresh writ and on 26th the petitioner withdrew his application of the 22nd in which he had complained of the resistance. On the 28th the Court suggested the issue of a fresh writ and the petitioner accordingly applied for this. On the 28th Chandi again objected to the issue of a fresh writ, and on 5th March the Munsif rejected the petitioner's application for the issue of a fresh writ, holding that he must either proceed under O. 21, R. 97, or bring a suit. It is against this order of the Munsif rejecting the application for a fresh writ that this application for revision has been made. The contention of Mr. Kulwant Sahai, the learned vakil for the petitioner, is that O. 21, R. 97, is merely permissive, that the auction-purchaser is not obliged to make use of the procedure provided by it and the succeeding sections and that without availing himself of it he may make a fresh application under R. 95. In support of his contention he cites various rulings to which I shall have occasion to refer later. The main contention of Mr. Shoroshi Charan Mitter, the learned vakil for the opposite party, on the other hand, is that R. 97 is mandatory in the case of an auction-purchaser who has been obstructed and that he cannot again apply for a fresh writ of possession. He further urges that none of the rulings referred to by Mr. Sahai are directly in point and has asked us to consider the present case as one of first impression; it seems to us desirable that we should do so.

Under the present Code of Civil Procedure, a decree-holder applying for possession of immovable property does so under O. 21, R. 35 and O. 21, R. 95, is the rule under which an auction-pur-

chaser applies for possession of immovable property purchased by him at a sale in execution of a decree. O. 21, R. 97, deals with obstruction or resistance in obtaining possession and it runs as follows:

"Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

I shall first deal shortly with the history of this rule as it appears from the corresponding provisions of the previous Codes of Civil Procedure. The first of these Codes is Act 8 of 1859 (an Act to simplify the procedure of the Courts of Civil Judicature not established by Royal Charter). The sections of this Act, which deal with the execution of decrees for immovable property, are Ss. 223 to 231, and S. 226 deals with obstruction to a decree-holder. This section is as follows:

"If in execution of a decree for lands or for immovable property the officer executing the same shall be resisted or obstructed by any person, the person in whose favour such decree was made, may apply to the Court at any time within one month from the time of such resistance. The Court shall fix a day for investigating the complaint and shall summon the party against whom the complaint is made to answer the same."

If then a decree-holder were obstructed in getting possession he was entitled to apply to the Court within a month to have his complaint investigated; S. 268 of the Act made the provisions of S. 226 and the succeeding Ss. 227 and 228 equally applicable to a purchaser of immovable property sold in execution of a decree who had been obstructed or resisted. Act 8 of 1859 then placed a decree-holder and an auction-purchaser, who had been obstructed, in exactly the same position and there was no provision in this Code which would bar either from making a fresh application for a writ of possession without making an application under S. 286. The next Code is Act 10 of 1877 and as the wording of the sections with which we are concerned is exactly the same as in the Code of 1882, they may be dealt with together. Under these Codes the decree-holder made an application for possession of immovable property under S. 230 and Ss. 328 to 333 dealt with obstruction and resistance to deli-

very of possession to a decree-holder S. 328 is as follows:

"If, in execution of a decree for the possession of property, the officer charged with the execution of the warrant is resisted or obstructed by any person, the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction. The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same."

By S. 334 the provisions of this and other sections dealing with obstructions to the decree-holder were made equally applicable to the obstructions to obtaining possession by the auction purchaser. The decree-holder and the auction-purchaser then were by the Codes of 1877 and 1882 placed in exactly the same position, and again there is nothing in either of these Codes which could be held to bar either from making an application for a fresh writ of possession without adopting the procedure provided by Ss. 228 to 233.

Order 21, Rr. 97 to 103, of the present Code, are substantially re-enactments of the corresponding provisions of the previous Codes, the only change being that instead of there being a separate section which makes the sections regarding obstruction to a decree-holder applicable to the case of an auction-purchaser, one set of rules has been enacted for both the decree holder and the auction-purchaser. The summary procedure provided by R. 97 and the corresponding sections of the previous Codes has been made applicable in exactly the same degree to decree-holders and auction-purchasers, and in none of the Codes is there any provision which would bar fresh applications for writ of possession if the summary procedure provided is not invoked. The words of R. 97 are that the holder of the decree of the auction-purchaser "may" apply under the rule if he is obstructed, not that he "must" so apply. The rule, in the present as in the previous Codes, is permissive, not mandatory; it merely provides an alternative remedy without barring any remedy which would otherwise be open, and there is nothing in this rule or in any other rule which would bar either a decree-holder or an auction-purchaser who does not choose to avail himself of this procedure from making an application for a fresh writ of possession. It would seem clear then on a consideration of the wording of R. 97 itself, and

also of the corresponding provisions of the previous Codes of Civil Procedure that either a decree holder or an auction-purchaser may apply for a fresh writ of possession without making any application under R. 97.

Mr. Mitter is forced to concede that a decree-holder may, without invoking the assistance of the Court under R. 97 and beyond the period of 30 days' limitation prescribed by that section, apply for a fresh writ of possession, but he argues that this is not so in the case of an auction purchaser, although he admits that if his writ of possession becomes infructuous for any other reason than that of resistance or obstruction, he may apply for a fresh writ. In our opinion this is an altogether illogical position which is unwarranted by any provision of the present or the previous Codes of Civil Procedure and it is inconceivable that, if a decree-holder can make a fresh application for execution under R. 35 without invoking the aid of R. 97, an auction-purchaser to whom R. 97 applies in exactly the same way should be precluded from doing so. It is admitted that the procedure provided by this rule is intended to be an additional aid to the decree-holder or the auction-purchaser, as the case may be, in obtaining possession by providing in case of obstruction a summary procedure. If the arguments of Mr. Mitter were to be accepted however in no sense would R. 97 be an additional aid to the auction-purchaser, because if he failed to adopt this particular procedure which might not be suitable in his particular case he would, after 30 days, be precluded from ever getting possession, except by a fresh suit. The rule would become mandatory in its operation in the case of an auction-purchaser, it would deprive him of a valuable right, and we are unable to accept the contention that in direct contradiction of the words of R. 97 and the corresponding sections of the previous Codes this was ever the intention of the present Code. I shall now deal shortly with the case law on the subject. The leading case under Act 8 of 1859 is *Hunkur Singh v. Madho Lall* (1). In this case it was held by Phear, J:

"The judgment-creditor may ask the Court to take action against the judgment-debtor in the matter of the execution of the decree at any

time within the period of three years from the last time that he made any application of the kind. He is not limited to a period of 30 days. The 30 days of S. 226 are important as being the limit prescribed within which the judgment-creditor may, by virtue of S. 228, bring in fact an action of ejectment against a stranger without the expense of instituting a regular suit. It seems to us that these proceedings in the Court below may well enough be carried on against the judgment-debtor, even though they were not instituted within 30 days after the time when the wrongful obstruction was alleged to have been put by him in the way of the judgment-creditor's obtaining possession."

That is to say a decree-holder might make a fresh application for execution outside the period of 30 days prescribed under S. 226 and without making any application under that section.

I next come to the Code of 1877, and here I need only refer to the case of *Ramasekara Pillai v. Dharmaraya Goundan* (2). In that case the decree-holders first applied for warrant of possession on 20th September 1880. They were resisted on 24th September and the warrant was not executed. They again applied for and obtained a second warrant and were again resisted on 25th January 1881, after which an application was made under S. 328 of the Code of 1887. It was held that limitation would run from the second obstruction. The question as to whether a fresh application for execution could be made by the decree-holder without complaining of the first obstruction under S. 328 was not even raised, and it is clear that the learned Judges who decided that case were not in doubt on the point, otherwise the question of limitation would have been differently decided. I next come to the Code of 1882. The first ruling to which I shall refer is *Balvant Santaram v. Balaji* (3). In that case West, J., remarked:

"The language of the Code in S. 328 is that the decree-holder may, not that he 'must', proceed in the way indicated and the similar language of the Code of Act 8 of 1859, having been construed by the Courts to leave an option to the judgment-creditor to proceed either summarily or by regular suit, the present Code is to be construed in the same sense, unless a different one is plainly intended."

In the case of *Narain Das v. Hazari Lal* (4), reported at p. 233, Vol. 18, *I. L. R. Allahabad*, an application for execution was made, there was resistance, execution was again applied for, again there was resistance and the question

(2) [1882] 5 Mad. 113.

(3) [1884] 8 Bom. 602.

(4) [1896] 18 All. 233.

(1) [1874] 21 W. R. 147.

was whether the limitation of one month should run from the date of the first resistance or from the date of the second resistance. The learned Judges reaffirmed the decision in the case of *Ramasekara Pillai v. Dharmaraya Goundan* (2) to which I have already referred and decided the case before them in the same way.

In the case of *Baranagore Jute Factory Co., Ltd. v. Rajkumar Rai* (5) the Calcutta High Court held that a decree-holder who was resisted in execution of a decree for ejectment, might apply for possession again and if again resisted might complain against the second resistance. This is exactly the same view as was taken in the cases already referred to and there can, now, be no doubt that a decree-holder may apply for fresh execution without making any application under O. 21, R. 97. So far all the rulings to which I have referred have dealt with the case of a decree-holder applying for possession, but in the case of *Muttia v. Appasami* (6) the same principle was applied in the case of an auction-purchaser. The cases of *Ramasekara Pillai v. Dharmaraya Goundan* (2) and *Balvant Santaram v. Babaji* (3), already referred to, were discussed and in the course of his judgment, Best, J. referring with approval to the case of *Balvant Santaram v. Babaji* (3), said:

"The language of S. 328 is that the decree-holder 'may', not that he 'must' proceed in the way indicated. There is therefore nothing to prevent the decree-holder or purchaser who has been obstructed or resisted in his attempt to get possession of the property decreed or purchased (as the case may be) from making a fresh application for delivery, without making any complaint under S. 328 or S. 331 of the Code,"

and Muttusami Aiyar, J., in the course of his affirming judgment in the same case remarked:

"By declaring in S. 331 that the provisions of Ch. 19 relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him are applicable to resistance or obstruction to the purchaser of any immovable property at a Court sale obtaining delivery of the property purchased, the legislature regarded such delivery as a step in execution of the decree."

The learned Judges in the case therefore placed the auction-purchaser and the decree-holder in the same position as regards obstruction or resistance to delivery of possession and held that failure on the part of either a decree-holder or

auction-purchaser to ask for the summary remedy did not debar them from making a fresh application for possession. The view taken by the learned Judges in that case is exactly in accordance with the view we have already expressed which is in our opinion the correct view of the law. The present case therefore is hardly one of first impression. It has however been urged by Mr. Mitter for the opposite party that he is supported in his contention by certain remarks made in *Baranagore Jute Factory Co., Ltd. v. Rajkumar Rai* (5). The remarks to which he refers are at p. 727 (of 13 C.W.N.). The learned Judges in that case had before them the question of a decree-holder and they decided, as I have already said, that the decree-holder could make a fresh application without making any application for summary procedure, but in the course of their judgment they remarked:

"There are, no doubt, cases which decide that a purchaser who has applied for possession under S. 318, Civil P. C., and been resisted, but who has not made a further application under S. 335, cannot be allowed to apply again for a fresh writ under S. 318."

What the cases are to which they intended to refer is not clear, but in any event the case of an auction-purchaser was not before them and their remarks are merely obiter. Possibly they had in mind the case of *Kesri Narain v. Abul Hasan* (7). In that case Aikman, J., held that an auction-purchaser who did not make an application for summary inquiry, cannot apply for fresh delivery of possession after the expiry of the period of 30 days' limitation. But although Knox, J., concurred, it is clear from the views expressed by him that he did not, in fact, agree, because the learned Judge says that he agrees with the opinion expressed in *Muttia v. Appasami* (6). This case therefore does not support Mr. Mitter's contention. Another case to which we have been referred and to which the Judges in the case of *Baranagore Jute Factory Co., Ltd. v. Rajkumar Rai* (5) referred is the case of *Vinaykrav Amrit v. Devrao Govind* (8). This case has however no bearing on the subject. Two Punjab cases of *Har Nihal v. Shamji Mal* (9) and *Ghulam Muham-mad v. Hassan Din* (10) are the only

(5) [1909] 1 I. C. 785.

(6) [1890] 13 Mad. 504=4 Ind. Dec. (n.s.)1063.

(7) [1904] 26 All. 365.

(8) [1887] 11 Bom. 473.

(9) [1910] 14 P. R. 1910=5 I. C. 409.

(10) [1910] 6 I. C. 649.

cases which support the proposition advanced by the learned vakil for the opposite party. The judgments in these cases however were by a single Judge; he advanced no reasons for his view and we must decline to be bound by them.

So far then as there is any case-law bearing directly on the point in issue in the present case, the weight of authority is in favour of the view that an auction-purchaser who is not the decree-holder, having made an application for delivery of possession and that application having been infructuous by reason of obstruction, is entitled to make an application for a fresh writ of possession within the period of limitation allowed for such an application, without applying under R. 97. The finding of the Munsif in the case now before us that the petitioner auction-purchaser must either apply under R. 97 or bring a suit is therefore in our opinion wrong. It has been urged however that the order rejecting the application for a writ of possession should not be set aside on revision in view of the fact that the petitioner has another remedy, namely by suit. The practice as to how far the High Court may interfere in revision has not been definitely settled either in this Court or, so far as I am aware, in any of the Courts in India. But it is the general rule of practice that a High Court will not interfere in any case in which the petitioner has another remedy, except in very exceptional circumstances. This, in my opinion, is a proper rule of practice and applying it to this particular case, I would reject this application for revision because not only has the petitioner a right to sue but in the view of the law which I have expressed, he will be entitled to make a fresh application for a fresh writ of possession at any time within the period of limitation allowed by law for such an application irrespective of any provision contained in R. 97.

Atkinson, J.—I entirely agree with the judgment delivered by my learned brother Coutts, J. I desire to add that I wish to express my entire concurrence with the opinion expressed by him as to the practice which prevails in all High Courts with reference to the exercise of power of revisional jurisdiction under S. 115, Civil P. C.

Manuk, J.—I agree entirely both as regards the answer to the question as referred to us and with regard to the order proposed; but I wish to add a few words on my own behalf with respect to the practice under S. 115, Civil P. C. It is as undesirable as impracticable to lay down any definite rule of practice, but it is, in my opinion, desirable that approximate uniformity of practice should, as far as possible prevail, at any rate in the same High Court. When the High Court can by interfering under S. 115 in appropriate cases terminate the litigation, the mere fact that another remedy by suit only lies should not per se be a reason for non-interference.

V.S./R.K.

Order accordingly.

* * A. I. R. 1919 Patna 430

Full Bench

DAWSON MILLER, C. J., COUTTS AND
MANUK, JJ.

Jungli Lall and others—Appellants.

v.

Laddu Ram Marwari and another—Respondents.

Misc. Civil Appeal No. 281 of 1917,
Decided on 4th February 1919.

* (a) **Execution—Objection that judgment-debtor was dead when decree was made can be raised in execution proceedings.**

It is open to the representatives of a judgment-debtor to object to execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him and that the decree was therefore a nullity. [P 431 C 2]

* (b) **Civil P. C. (1908), O. 22, Rr. 4 and 6 and O. 34—Mortgage suit—Defendant dying after passing of preliminary decree—Final decree obtained without bringing his legal representatives on record—Decree so obtained is nullity.**

The procedure prescribed for mortgage suits by O. 34, differs from that prescribed by the Transfer of Property Act in that it requires a final decree to be passed before execution can take place, and before that is done there is no decree or judgment that can be executed.

Although in a mortgage suit the plaintiff's right to execute the final decree depends in part upon the determination of issues upon which the preliminary decree was based, no final decree can be obtained without a further hearing and determination of subsequent issues, and therefore in such a suit, the hearing contemplated in O. 22, R. 6, Civil P. C., must be taken to be the final hearing which must necessarily take place before a decree capable of execution can be passed.

Therefore where a defendant in a mortgage suit dies after the passing of the preliminary decree and the final decree is obtained without bringing his legal representatives on the record,

the decree so obtained is a nullity and is not capable of execution. [P 433 C 2]

Lalit Mohan Ghosh, Paranasi Prasad Jhunjhunwalla and Nobe Kumar Chowdhari—for Appellants.

D. N. Sarkar—for Respondents.

Dawson-Miller, C. J.—The plaintiffs, who are respondents before us, instituted a mortgage suit before the Munsif of Bhagalpur against two brothers Bangli Lall and Raghu Lall, the property, the subject-matter of the mortgage, being owned by these defendants jointly as co-parceners. On 2nd March 1914 the plaintiffs obtained a preliminary decree against the defendants. On 16th March 1914, Raghu Lall died. On 12th May 1915 the conditions of the preliminary decree necessary to avoid a sale of the mortgaged property not having been complied with, the plaintiffs applied for a final decree before the Munsif.

On 26th May 1915 after hearing the pleader for the plaintiffs and reading the affidavit in support of the application, the final decree in the suit was passed by the Munsif against Bangli Lall and Raghu Lall whose names still appeared on the record as defendants, ordering the mortgaged property to be sold. Up to this time no steps had been taken by the plaintiffs to bring the representatives of Raghu Lall upon the record, although he had died more than a year earlier. No one appeared on behalf of the defendants on the application for a final decree, which is not surprising in the case of Raghu Lall as he had been dead for over a year. It appears from the record that the schedule of the plaintiffs' costs in the application includes a fee for service of process. How notice was served upon Raghu Lall we are not informed, nor is the peon's report before us. In due course the plaintiffs proceeded to take steps to execute their decree against Bangli Lall, the surviving defendant, and Jangli Lall and others, the minor sons and heirs of the deceased defendant Raghu Lall who were then entered on the record in the execution case as judgment-debtors. The final decree was filed as that of which execution was sought. Objection was taken on behalf of the judgment debtors Jangli Lall and others whose names now appeared on the record that the decree sought to be executed was a nullity having been passed against a dead man and could not be executed. This objec-

tion was disallowed by the Munsif, who considered that it was not tenable at that stage and that the executing Court could not go behind the decree or enquire into its validity. On appeal the District Judge upheld the Munsif's ruling considering that the judgment of the Calcutta High Court in *Kalipaḍa Sirkar v. Harimohan Dalal* (1) was conclusive on the point. The representatives of Raghu Lall appealed from that decision to the High Court. The learned Judges of this Court considered that the decisions on the point were conflicting and that the matter was of sufficient importance to be referred to a Full Bench. The case was accordingly referred to this Bench for determination, the following question being formulated, namely :

"Whether it is open to the representatives of a judgment-debtor to object to execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him and that the decree was therefore a nullity."

In my opinion, this question should be answered in the affirmative. The contention of the appellants is that a decree passed against a dead man is a mere nullity and cannot be executed unless the circumstances bring the case within the provisions of O. 22, R. 6, Civil P. C. They further contended that under O. 22, R. 4, the suit had abated against the deceased defendant before the final decree was passed, as right to sue did not survive against the surviving defendant alone and no application had been made to the Court to substitute the deceased's legal representatives as parties within six months of his death or any steps taken to set aside the abatement. It is not disputed by the respondents that as a general proposition it is true to say that a decree passed against a dead man is a nullity, but they contend that the executing Court cannot take notice of this defect and is bound to execute the order contained in the decree without question, the only remedy open to the objectors being by a separate suit or by appeal from the decree.

The further contend that this question does not really arise in the particular circumstances of the present case, as the hearing terminated on or before the 2nd March 1914 when the preliminary decree was passed, and judgment was pronounced either at that date or at the date of the final decree on 26th May 1915. If the

(1) 1917] 44 Cal. 627=35 I. C. 856.

former date is to be taken as that of the judgment, then it was passed before the death of Raghu Lall who died a fortnight later and the plaintiffs' rights against him and his estate were merged in the preliminary decree which can be executed against his representatives, the final decree being merely a part of the procedure necessary to enforce the rights conferred upon them by the judgment and the preliminary decree. If on the other hand, the judgment must be taken as having been pronounced at the date of the final decree in 1915, then they contend there can be no abatement as Raghu Lall died between the hearing and the pronouncement of judgment within the meaning of O. 22, R. 6, which provides as follows :

"Notwithstanding anything contained in the foregoing rules whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

It is convenient to consider this contention of the respondents before dealing with the broader question. In support of the first branch of this argument the respondents rely on the case of *Munna Lal Puruck v. Sarat Chunder Mukerjee* (2), a decision of Sir Lawrence Jenkins, C. J., affirmed on appeal to His Majesty in Council as showing that the preliminary decree was in itself complete and was really that of which execution was sought. The passage relied on in that judgment merely decides that a decree under S. 89, T. P. Act is a decree for sale which requires no further decree to perfect it and that the subsequent order required by the procedure prescribed by that Act is an order for the realisation of the decree. It was accordingly decided that an application for such an order was an application to enforce a judgment within Art. 183, Lim. Act. That decision was expressly confined to a consideration of the effect of the procedure laid down by the Transfer of Property Act. The present procedure prescribed by O. 34 of the Code of 1908 differs from that of the Transfer of Property Act in that it requires a final decree to be passed before execution can take place, and until that is done there is no decree or judgment that can be executed. In fact the decree

which was filed for execution in the present case was the final decree. Before this can be passed there must be a judgment determining whether the defendants have complied with the provision of the preliminary decree, compliance with which would bar the plaintiffs' right to the sale. Judgment is defined in the Code as the "statement given by the Judge of the grounds of a decree or order" and it was that judgment which was to be enforced by execution in the terms of the final decree. I am of opinion therefore that the judgment which it is sought to enforce was that which was delivered at or immediately before the date of the final decree.

The question then arises whether O. 22, R. 6, applies, Raghu Lall having died shortly after the preliminary decree was passed and about a year before the final decree. The respondents' argument is based on the hypothesis that the hearing terminated on or before the date of the preliminary decree. In my opinion, O. 22, R. 6, has no application to the circumstances of this case. The hearing contemplated in that rule must, I think, be taken as the hearing of the issues upon which judgment was to be delivered determining the plaintiffs' right to a final decree, which alone could be executed. Although the plaintiffs' right to execution depended in part upon the determination of the issues upon which the preliminary decree was based, no final decree could be obtained without a further hearing and determination of subsequent issue and I think it must be taken that the hearing contemplated in O. 22, R. 6 was the final hearing which had necessarily to take place before a decree capable of execution could be passed. It follows therefore if this view be accepted that Raghu Lall did not die between the conclusion of the hearing and the pronouncement of judgment and that when the judgment was pronounced and a decree passed against him the suit as against him had long abated.

It remains to consider whether the decree or that which in the present case purports to be a decree can be objected to in execution proceedings on the ground that it is a nullity having been passed against a person who died before the hearing and before judgment. I am unable to distinguish the present case from that of *Narendra Bahadur Chand v. Gopal*

(2) A. I. R. 1914 P. C. 150=42 Cal. 776=42
I. A. 88=27 I. C. 683 (P. C.).

Sah (2), where the same question arose for determination and was decided in the affirmative. Another instance where the Calcutta High Court decided that a decree passed against a dead person is incapable of execution is the case of *Roop Narain Singh v. Ramayee Singh* (3), decided in 1878 where the application for execution was made under S. 11, Act 23 of 1861. There are numerous later cases where a decree passed in favour of or against a dead person has been pronounced to be a nullity and incapable of execution. *Imdad Ali v. Jagan Lal* (4), *Vishvanath Dnyanoba v. Lallu Kabla* (5), and *Subramania Aiyar v. Vaithinatha Aiyar* (6), are cases where the High Courts of Allahabad, Bombay and Madras have upheld an objection taken in execution of decrees of this nature. The learned Vakil for the respondents however has urgently called our attention to the decision of the Calcutta High Court in *Kalipada Sirkar v. Harimohan Dalal* (7), which decided that the validity of a judgment cannot be impeached in execution proceedings on the ground that a lunatic plaintiff was represented in the suit by a person not legally competent to act in that capacity. There are no doubt dicta in that judgment which if taken as of general application and apart from the context would be wide enough to include the present case. The following passage occurs at page 632 (of 44 Cal.) of the report

"It is indisputable that the Court executing a decree must take the decree as it stands and had no power to go behind the decree or to entertain an objection to the legality or to correctness of the decree."

There are other similar expressions to be found in the judgment to the effect that the validity of the decree cannot be questioned by the executing Court. The proposition here laid down would appear to be wide enough to cover not only a decree which is voidable but one which is void *ab initio* and if this is intended to be the meaning of the passage quoted, I must respectfully decline to accede to that proposition. A passage at the end of the judgment however would seem to indicate that such was not the intention. After referring to the principle laid down

(2) [1913] 20 I. C. 506.

(3) [1879] 3 C. L. R. 192.

(4) [1895] 17 All. 478.

(5) [1909] 4 I. C. 137.

(6) [1915] 28 Mad. 682=31 I. C. 198.

(7) [1917] 44 Cal. 627=35 I. C. 856.

by Lord Cottenham in *Chuck v. Cremer* (8) that every order and judgment however erroneous is good until discharged or declared inoperative the judgment proceeds:

"This no doubt assumes that there is a valid decree in existence that is an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is capable of execution."

If the broad proposition that an enquiry into the validity of a decree is in all cases outside the functions of the executing Court must be taken subject to the proviso that there is a valid decree in existence, it would seem to follow that in the opinion of the learned Judges who delivered that judgment the limitations imposed on the executing Court are removed if there is no valid decree which it can execute. I am unable to accept the view that it was their intention to lay down the broad proposition contended for, that in no case can the validity of a decree be called in question by the executing Court when at the same time the proposition is restricted to cases where there is a valid decree in existence.

It should be unnecessary to point out the distinction between that which is void and that which is merely voidable but a failure to bear this obvious distinction in mind is apt to lead to confusion and to the use of language which does not accurately express the meaning intended. That which is void can be treated as nonexistent and of no binding force or effect; that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal. In the latter case the executing Court is not competent to make such a declaration: in the former case neither the executing Court nor any other tribunal is bound to take notice of that which is a nullity although it may take the form of a decree.

The decision in *Kalipada Sirkar v. Harimohan Dalal* (7) was based mainly upon the judgment of Judicial Committee in *Rashidunnissa v. Muhammad Ismail Khan* (9) and the facts were similar. The latter case however is no authority for the proposition now contended for. The basis of that judgment was that objection could not be taken in execution proceedings by a person who is

(8) [1846] 2 Phil. 113.

(9) [1909] 31 All. 572=36 I. A. 168=3 I. C. 864. (P.C.).

not a party nor a representative of a party to the suit in which the decree was passed within the meaning of S. 244, Civil P. C., 1882. In the present case it is not disputed that the appellants were the representatives of a person who was a party to the suit. They were so treated by the respondents who made them parties to execution proceedings in their representative capacity, and as such they were competent to take proper objection to the execution of the decree before the executing Court and if my view expressed above is right that Court was bound to hear the objection. In any case if the decree is void, it can and ought to be disregarded without any formal proceedings to set it aside and the Court has no jurisdiction to execute it against the property of the deceased defendant. In my opinion this appeal should be allowed and the order of the District Judge affirming the order of the Munsif, in so far as it refused to hear the appellants' objection, should be set aside and the case referred back to the executing Court to hear the objection according to law. The appellants are entitled to their costs of the appeal here and in the Court below.

Coutts, J.—I agree with the learned Chief Justice that this appeal must be allowed. The appeal arises out of an order passed by the District Judge of Bhagalpur, confirming the decree of the Munsif, refusing to entertain an objection made in certain execution proceedings that the decree having been passed against a person, who was dead at the time of the decree was a nullity. The facts of the case are shortly that one Laddu Ram Marwari, obtained a preliminary decree for the sale of certain mortgage property against two persons Bangli Lall Sahu and Raghu Lall Sahu. This preliminary decree was passed on 2nd March 1914. On 16th March 1914, Raghu Lall died, but in spite of this on 12th May 1915, or more than a year later, Laddu Ram applied for a final decree against Bangli and Raghu. The 22nd May 1915, was fixed for the hearing of this application. From the final decree it appears that the matter was heard on that day, and no objection being made, a final decree for the sale of the property mortgaged was passed. Subsequently Laddu Ram applied to execute the decree against Bangli Lall and the representa-

tives of the deceased judgment-debtor Raghu Lall. His legal representatives objected on the ground that the final decree against Raghu was a nullity, but their application was rejected on the ground that the executing Court could not go behind the decree. On appeal to the District Judge he upheld the decision of the Munsif on the authority of *Kalipada Sirkar v. Harimohan Dalal* (7) and it is against this order that the present appeal has been filed.

The appeal was first heard by a Divisional Bench of this Court, which, in view of the importance of the question involved, referred it to a Full Bench for a decision of the question, whether it is open to the representatives of a judgment-debtor to object to the execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him and the decree was therefore a nullity. The general proposition is not denied that a decree against a dead person is a nullity, but two arguments have been addressed to us to show that the decree in the present case is not a nullity. I am doubtful whether under the terms of the reference it was open to the respondent to raise this question, but as it has been argued at some length and as it is of importance, it has been considered. The first contention is that the decree which was to be executed was the preliminary and not the final decree and the second is that even if this were not so, the decree is saved from being a nullity by the provisions of O. 22, R. 6, Civil P. C.

With regard to the first point it is true that the date of the decree given in the application for execution is the date of the preliminary decree but the decree which the Court was asked to execute, a copy of which was attached to the application, was the final decree. Nor could the executing Court have considered an application to execute the preliminary decree alone in a case in which both a preliminary and a final decree had been passed.

The second point urged is that even assuming that the decree which was to be executed was the final decree it was saved from being a nullity by the provisions of O. 22, R. 6, Civil P. C. the contention being that the hearing referred to in that rule in cases such as the present is the hearing before the passing of

the preliminary decree. This contention cannot be accepted. It is clear that the cases contemplated by the rule are cases in which after the hearing is complete judgment is reserved and a party dies before the judgment can be delivered. It was not intended to provide for a case such as the one now before us where the party has died after the preliminary decree and before the passing of the final decree. Although the basis of the final decree is the preliminary decree it does not conclude the matter for there are certain matters which it is necessary to consider before the final decree can be passed the most important being whether the whole or any part of the debt has been paid and whether any sale of the property is necessary. To decide this a hearing is necessary and in the present case as would appear from the final decree there was such a hearing. After this hearing the order or judgment on which the final decree is based was passed and it is this hearing which in my opinion is referred to in O. 22, R. 6, Civil P. C. In this case then the defendant did not die between the hearing and the judgment but more than a year before the hearing the case therefore is not covered by O. 22, R. 6, Civil P. C. and is not saved by this rule. From another point of view also it appears that the final decree was a nullity. Raghu Lall died on 16th March 1914, but the final decree was not passed until 12th May 1915. The suit therefore so far as he was concerned had abated and no decree could be passed against him. That a decree against a dead person except in the peculiar circumstances of O. 22, R. 6, Civil P. C. is a nullity, has also been held in a series of rulings.

Representatives of Girendranath Tagore v. Huronath Roy (10), *Roop Narain Singh v. Ramayee Singh* (3), *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* (11), *Vishvanath Dnyanoba v. Lallu Kabla* (5), *Imdad Ali v. Jagan Lal* (4), *Subramania Aiyar v. Vaithinatha Aiyar* (6), *Topanram Nathuram v. Tekchand* (12), *Narendra Bahadur Chand v. Gopal Sah* (2). The question now remains whether the decree being a nullity the executing Court can

refuse to execute it. On the face of it, it would appear that it not only can but that it must so refuse because the decree is not in fact a decree at all and there is nothing which can be executed. This was the view taken in the rulings.—*Representative of Girendranath Tagore v. Huronath Roy* (10), *Roop Narain Singh v. Ramayee Singh* (3), *Imdad Ali v. Jagan Lal* (4), *Subramania Aiyar v. Vaithintha Aiyar* (6), *Topanram Nathuram v. Jekchand* (12) and *Narendra Bahadur Chand v. Gopal Sah* (2).

The learned District Judge has relied on *Kalipada Sirkar v. Harimohan Dalal* (7) decided by Mookerji and Cuming, JJ. This case is however clearly distinguishable from the present case and does not in fact support his view. The decision in this case was based on the Privy Council decision in *Rashidunnissa v. Muhammad Ismail Khan* (9). In that case the plaintiff a minor girl sued for a declaration that certain decrees and sales in execution were invalid so far as she was concerned chiefly because her sister who was a married woman had in the suits in which those decrees were made been improperly appointed her guardian ad litem. It was contended by the defendants that the suit was barred by S. 244, Civil P. C., 1882. It was held by the Subordinate Judge that the suit was not barred and the plaintiff's suit was decreed. The High Court set aside this decision holding that the suit was barred, but on appeal to the Privy Council this decision of the High Court was set aside, their Lordships observing that

"Section 244, Civil P. C., applies to the questions arising between parties to the suit in which the decree was passed that is to say between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge, that the appellant was never a party to any of these suits in the proper sense of the term. Her sister . . . was a married woman, and therefore was disqualified under S. 467 of the Code from being appointed guardian for the suit."

In *Kalipada Sirkar v. Harimohan Dalal* (7) the plaintiff was a lunatic who was represented by his wife. The suit was dismissed and costs were allowed to the defendant. Execution was sought for against the plaintiff's son, the plaintiff having died in the interval. In the execution proceedings the lunatic's widow was appointed guardian ad litem of her

(10) [1863] 10 W. R. 455.

(11) [1902] 26 Bom. 317.

(12) [1912] 5 S. L. R. 260=15 I. C. 832.

infant son and she objected that when she was appointed guardian for the lunatic in the suit she was a minor. The executing Court overruled this objection and on appeal to the High Court the decision was affirmed. The case, as I have already said, was decided on the authority of *Rashidunnissa v. Muhammad Ismail Khan* (9). The case now before us however is an entirely different one. In the cases *Kalipada Sirkar v. Harimohan Dalal* (7) and *Rashidunnissa v. Muhammad Ismail Khan* (9) there was, at the time of passing the decree a person in existence against whom a decree could be passed. That person was improperly represented and the decree was liable to be set aside but until it was set aside it was valid and operative and this being so, the executing Court was not entitled to go behind it and question its legality or validity. In the case now before us there was no person in existence against whom a decree could be passed, the decree was a nullity, it was incapable of execution and the Court, so far as the deceased defendant was concerned, had before it no decree which could be executed. It is true there are several observations in the judgment of Mookerji and Cuming, JJ., which would seem to cover a case as the one before us, but from the concluding words of their judgment it is clear that it was not the intention of the learned Judges that they should do so, because after quoting the words of Lord Cottenham in *Chuck v. Cremer* (8) they say :

"This no doubt assumes that there is a valid decree in existence that is an adjudication by a Court of justice a decree or order which has not ceased to be operative and is capable of execution."

The decision does not cover the case now before us and neither this decision nor the decision in *Rashidunnissa v. Muhamad Ismail Khan* (9) is any authority for the proposition that when a decree is a nullity by reason of having been passed against a dead defendant the executing Court cannot refuse to execute it.

Manuk, J.—This miscellaneous appeal comes before us on a reference made by the Divisional Bench. In order to understand the precise question for our decision it is necessary to set out the facts. The respondent instituted a suit on a mortgage against two persons, Bangli Lall Sahu and Raghu Lall Sahu.

On 2nd March 1914, he obtained a preliminary decree which is not before us. On 12th May 1915 the decree holder applied under O. 34, R. 5 (2), for a final decree against both the above-named defendants. On this application notices were apparently directed to issue on them and 22nd May 1915 was fixed for hearing. There being no appearance on that date on behalf of the defendant Raghu Lall Sahu, a decree was passed against both the defendants in the following terms :

"Upon reading the preliminary decree for sale made in the above suit on 2nd day of March and the petition of the plaintiff named above dated 12th May 1915 and the affidavit of Chandi Prasad, karpardaz of the plaintiff, affirmed on 11th May 1915 and after hearing Babu Dharendra Nath Sen, pleader for the plaintiff, and none for the defendant and it appearing that the amount declared due by the said preliminary decree has not been paid, it is ordered that the immovable properties mentioned in the said decree and specified at the foot thereof be sold by public auction, etc., etc."

This decree is dated 26th May 1915. On 15th July 1916 the decree holder applied for execution by sale of the mortgaged properties, but this application proved infructuous for reasons with which we are not concerned. On 4th April 1917, he again applied for execution by sale of the mortgaged properties. In this application in the appropriate column he stated the date of the decree to be 2nd March 1914, which is in fact the date of the preliminary decrees. With his application however he filed a copy of the final decree of 26th May 1915 as the decree which he sought to execute. The appellants who are sons of Raghu Lall then objected to the execution on the ground that their father Raghu Lall had in fact died on 16th March 1914 and that therefore the decree of 22nd May 1915 was incapable of execution as being passed against a dead person. The learned Subordinate Judge after hearing the parties passed the following order on 30th June 1917 :

"This is a case under S. 47. There are two main objections in this case. One is that the decree is not valid inasmuch as it was passed against a dead person. This objection is not tenable at this stage and the executing Court cannot go beyond the decree. This objection therefore fails."

It may be convenient to add that we are not concerned with the second ground of objection which was also disallowed. An appeal against this order was preferred to the District Judge, who on

28th August 1917 dismissed the appeal in the following terms :

"It is correctly laid down by the Munsif that the executing Court cannot go beyond the decree. The latest ruling in *Kalipada Sirkar v. Hari-mohan Dalal* (7) is conclusive on the point."

The respondents then appealed to this Court, when it appeared that this Court had held in *Mt. Muna Koer v. Durga Prasad* (13), that an objection such as theirs may be preferred under S. 47, Civil P. C. It also appearing that there was a conflict of authority on the question in other High Courts, the appeal was referred to a Full Bench and thus comes before us. The learned vakil for the appellants concedes that it is now settled law that the correctness or validity of a decree cannot be questioned in execution proceedings, but contends that the decree passed against Raghu Lall on 26th May 1915, some 14 months after Raghu had died, was a nullity, that is it was only something which purported to be a decree and incapable of execution at all, and that therefore such an objection may be maintained under S. 47 by Raghu Lall's representatives. His argument in support of this contention proceeds on two main lines : (1) S. 50, Civil P. C., is the only provision in the law with respect to the execution of decrees against a deceased judgment-debtor, and this section is conversant only with cases in which the judgment-debtor was alive when the decree was passed. The decree in S. 50 must mean a decree which is not a nullity and there is no provision referable to a decree against a man already dead, other than the provisions of O. 22. (2) Under O. 22, R. 4 the right of the plaintiff to sue did not survive against Bangli Lall alone but against the sons of Raghu Lall as well. Consequently under that rule, read with Art. 177, Lim. Act, the legal representatives of Raghu Lall had to be made parties within six months from the date of Raghu Lall's death. No such substitution having been made, the suit as against Raghu Lall abated, and once abatement has taken place no order can be passed in the suit till that abatement is set aside under O. 22, R. 9 on an application to be made within 60 days from the date of abatement (Art. 171, Lim. Act). There having been no such application there was in fact no suit pending as against Raghu

Lal on 26th May 1915 and so no decree could have been passed against him. In support of his contentions the learned vakil cites the following cases : *Representatives of Girendranath Tagore v. Huronath Roy* (10), in which it was held that when a suit is instituted and a decree passed against a person who was dead at the time the suit was instituted the decree cannot be executed against his legal representatives, and that S. 210 (Act 8 of 1859) contemplates only the case of a person who being alive when the decree is passed dies before execution has been fully had. It may be noticed that S. 210 Act 8 of 1859 ran as follows:

"If any person against whom a decree has been made shall die before execution has been fully had thereof, an application for execution thereof may be made against the legal representative of the estate of the person so dying as aforesaid."

The language of that section is substantially similar to that of S. 50 of the present Code and I am of opinion that S. 50, like the old S. 210, does not include or provide for the case of a person against whom a decree is made having died before the decree is made. As was pointed out by Macpherson, J., in that case:

"It is little to be wondered at that the Code does not provide for such a contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men."

It was held that the decree could not be executed against the legal representatives of the deceased, and the entire execution proceedings were quashed. In *Roop Narain Singh v. Ramayee Singh* (3) the sole defendant to a suit died before the decree was passed against him on the supposition of his being still alive and nobody was substituted in his place. On these assumptions the Calcutta High Court held that;

"when the decree purporting to be a decree against Sheo Narain was made, there was no one in being against whom it was made and that as a consequence the decree was void,"

and the decree-holder could not be allowed to proceed with the execution which was objected to by the heirs of the deceased judgment-debtor. In *Imdad Ali v. Jagan Lal* (4) the suit had been instituted against two persons; one of them died before the decree was made, but a decree was made as against both without any representative of the deceased defendant being brought on the record. An appeal from that decree by the latter

(13) [1917] 2 Pat. L. J. 192=39 I. C. 172.

defendant's representative was dismissed on the ground that he had no locus standi to appeal as he had not been made a party to the record of the suit. The decree-holders then took out execution and, without any notice to the legal representative of the deceased defendant, were put in possession of the property. The deceased's legal representative then applied to the Court to hold that the decree was null and void and incapable of execution and to restore him to possession. The Munsif dismissed his application. The High Court (Sir John Edge, C. J. and Banerji, J.) held that the decree was so far as the deceased defendant's representative and her interest in the property are concerned, a void decree and incapable of execution and that the proceedings in execution were ultra vires and without jurisdiction and the application of the objector was one to be dealt with under S. 244. The proceedings in execution, so far as the deceased defendant's property was concerned, were set aside and the objector was directed to be restored to possession. In *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* (11) at the date of the hearing of an appeal the appellant was dead, but neither his pleader nor the Court was aware of the fact, so the appeal was heard without any substitution and the decree of the lower Court against the appellant confirmed. The appellant's son then applied to have his name placed on the record and the appeal re-argued on the ground that his father had died before the appeal had been heard. In these circumstances the High Court held that the decree of the appellate Court was a nullity.

In *Vishvanath Dnyanoba v. Lallu Kabla* (5), after the conclusion of the evidence but before the argument, the plaintiff died and the Court passed a decree in his favour, though his sons had not been brought on the record as his representatives. It was held by the Bombay High Court on a construction of O. 22, R. 6, that the hearing had not concluded when the plaintiff died and that the decree was "absolutely a nullity." It is noteworthy that the legal representative in that case had preferred an appeal against the decree but had withdrawn it, and then resisted, on the ground before mentioned, the application of the decree-holder to execute the decree. The Courts

below had allowed execution, but the High Court held that there was nothing that could be executed and the application to execute must be rejected.

The facts in *Narandra Bahadur Chand v. Gopal Sah* (2) were that the decree-holder sought to execute a decree against the objector as being the legal representative of one Kishen Dayal, who died on 13th February 1905 before the decree-holder's appeal to the High Court was heard, decided and eventually decreed on 26th April 1905, though the appeal had been filed in Kishen Dayal's lifetime against him as a respondent. One of the main objections of the objector was that the decree was a nullity inasmuch as it was passed after the death of Kishen Dayal and so could not be executed. It was argued on his behalf that the decree being a nullity it was not necessary to have it set aside. From the report it appears that the decisions in *Imdad Ali v. Jagan Lal* (4) and *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* (11) were cited in argument in support of the objector's contentions. The decision in *Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji* (14) was also referred to at the Bar. The contentions on the other side were that the executing Court could not go behind the decree and that, so long as the decree subsisted the decree-holder was entitled to have it executed against the judgment-debtor's legal representative. The learned Sir Lawrence Jenkins, C.J., held that the application to execute was not tenable, having regard more particularly to S. 50, Civil P. C. It is noteworthy that in framing the question for the Court's decision the learned Chief Justice refers to the judgment-debtor on the decree record as "a person against whom the decree purports to have been passed."

The decision in *Subramania Aiyar v. Vaithinatha Aiyar* (6) is to the same effect. There it was contended that the decree in execution, although passed after the death of the defendant and before his legal representatives were impleaded, was not void, but must be set aside under separate proceedings before it can be treated as a nullity. Oldfield, J., held that the decree under execution was null and void, that proceedings to avoid it were unnecessary and that as the objection was to the jurisdiction of the (14) 3 O. L. J. 188.

Court to pass the decree the objection was rightly considered and allowed in execution proceedings. *Goda Coopuramier v. Sundarammal* (15) was distinguished as referable to the case of a deceased plaintiff and the Bombay and Allahabad decisions alluded to above were followed.

In *Mt. Muna Koer v. Durga Prasad* (13) on facts precisely similar to those in *Narendra Bahadur Chand v. Gopal Sah* (1), referred to above, Mullick and Jwala Prasad, JJ., held in this Court that as the objection was that the deceased was not a party to the suit at the time it was decreed on appeal, the question as to whether execution could proceed against his widow fell within S. 47, Civil P. C. We were also referred on behalf of the appellants to *Arjun Das v. Gunendra Nath Basu Mullik* (16), in which a sale held after the death of a judgment-debtor in execution of a decree against him was set aside, and to the dictum in *Gulab Sao v. Chowdhury Madho Lal* (17) that an order without jurisdiction must be regarded as a nullity and need not be judged to be such by formal and direct proceedings to have it vacated or reversed. But these two cases do not really touch the questions which we have to decide, namely whether the decree itself can be regarded as a nullity and can be attacked on that ground in execution proceedings.

Mr. D. N. Sarkar on behalf of the respondent, while admitting the broad proposition that a decree passed against a dead person may under certain circumstances be a nullity, contends that this is not universally true since O. 22, R. 6, was introduced into the new Code of Civil Procedure of 1908. As I understand his argument it comes to this: that in the case before us there was in fact no abatement inasmuch as the preliminary decree must be taken as the concluding point of the suit both as to hearing and pronouncing of judgment (O. 22, R. 6) and that as Raghu Lall was admittedly alive on that date, the provisions of O. 22, Rr. 4 and 9, have no application to the case. To support this contention the learned vakil first pressed upon us the fact that the decree holder had really applied to execute the preliminary de-

oree; but when the learned vakil's attention was drawn to the record itself he abandoned this position. He maintains however, that the order absolute which used to be passed on such suits under S. 89, T. P. Act, now equivalent to the decree for sale under O. 34, Cl. (2), Civil P. C., was really a step in execution, and not a continuation of the suit itself.

In *Munna Lal Parruck v. Sarat Chunder Mukerji* (1) the Calcutta High Court very clearly pointed out the reasons for the repeal of S. 89, T. P. Act, and the substitution therefor of O. 34, R. 5 (2), the first of which reasons was the conflict of decisions as to whether an application for an order under S. 89, T. P. Act, was an application in execution or not. Sir Lawrence Jenkins, C. J., observed that the scheme, whereby this conflict was to be composed, was by making it clear that an application which is to follow on a preliminary decree for sale was not to be an application in execution inasmuch as the next step under O. 34, R. 5, is not for an order for sale but for a decree for sale. In my opinion it is clear that under the previous law no supplemental decree but only an order was required; while under the present law the preliminary decree is an incomplete decree and requires a further decree before the execution stage can be entered upon. That being so the proceedings between the preliminary decree and the final decree must be proceedings in the suit itself and there must be a further hearing before pronouncing of the final judgment on which is based the final decree. In the nature of things many questions may arise between the parties to the suit requiring the consideration of the Court before passing a final decree for sale: see *Hiramony Biswas v. Musa Khan* (18). The occasions on which the Court applies its mind to such questions in the presence of the parties or one of the parties are undoubtedly hearings within the meaning of O. 22, R. 6. If necessary, the appellants can also call in aid the definition of a "judgment" in S. 2 (9), and the explanation to the definition of a decree in S. 2 (2), Civil P. C. Applying these tests to the present case, it is obvious, on the face of the final decree of 26th May 1915, that the preliminary decree of 2nd

(15) [1909] 33 Mad. 167=3 I. C. 739.

(16) [1915] 27 I. C. 294.

(17) [1905] 2 C. L. J. 384.

(18) [1910] 7 I. C. 625.

March 1914, the petition of the plaintiff of 12th May, the affidavit of his Karpardaz of 11th May, and the arguments of the vakil were considered and heard, and this hearing was 14 months after the death of Raghu Lall without any representative of his having been brought on the record. In my judgment therefore O. 22, R. 6, has no application to the facts of the case and the respondent's contention on this head must fail.

It is next argued however on behalf of the respondent that the appellants in any case are not entitled to take this objection in execution proceedings and he relies on *Kalipada Sirkar v. Harimohan Dalal* (7). Now that was a case in which a suit was instituted by one Mohamaya Dasi as manager of her lunatic husband and the defendant objected to the suit on the ground that Mohamaya Dasi was a minor when she was appointed guardian under Act 35 of 1858. The Subordinate Judge finding that she was a minor dismissed the suit and allowed costs. The defendant applied for execution with respect to those costs against the infant son of the lunatic under the guardianship of his mother, the lunatic having died in the interval. With her consent she was appointed guardian ad litem and on the merits objected that when the decree for costs was made in the original suit she was herself a minor incompetent to act as next friend of the lunatic and that the decree was consequently illegal and ultra vires and incapable of execution against the estate of her husband in the hands of his minor son. The question for determination was, to quote the words of the judgment of the High Court:

"Whether the validity of the decree can be questioned in execution proceedings, on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, any operative decree for costs could not have been made against him."

The question was answered in the negative, the real ground for which apparently was that the point was concluded by the decision of the Judicial Committee in *Rashidunnissa v. Muhammad Ismail Khan* (9) as the lunatic was never a party to the suit in the proper sense of the term. This was sufficient for the decision of the case before the Court. There are however certain general observations and particularly the observation that the decision in *Imdad Ali v. Jagan Lal* (4) was clearly

opposed to the decision of the Judicial Committee in *Rashidunnissa v. Muhammad Ismail Khan* (9) which were not necessary for the decision of the case before the Calcutta High Court and are therefore really obiter. It is noteworthy however that the learned Judges in concluding their judgment observed:

"This no doubt assumes that there is a valid decree in existence, that is, an adjudication by a Court of justice, a decree or order which has not ceased to be operative and is capable of execution."

The decision of their Lordships of the Privy Council in *Rashidunnissa v. Muhammad Ismail Khan* (9) referred to a case where, contrary to the provisions of S. 457 of the Code of 1882, a minor had been represented throughout certain litigation by a married woman, her sister and guardian of her person, and their Lordships held that a suit by her to set aside the decrees (and sales which had taken place in execution of them) was not barred by S. 244, of the then Civil P. C. The Calcutta High Court had dismissed the suit upon the ground that the decrees upon which the execution proceedings were founded, were not in any way impeached in the suit, which in fact impeached the proceedings in execution of those decrees, and therefore objection should have been made under S. 244, Civil P. C., and not by a separate suit. Their Lordships of the Judicial Committee in reversing the decision of the High Court observed:

"Section 244, Civil P. C. applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agreed with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term."

I am therefore of opinion that that case as well as the case in *Kalipada Sirkar v. Harimohan Dalal* (7) are both clearly distinguishable from the present case. In the case before us it cannot be said that Raghu Lall was never a party to the suit in the proper sense of the term. It is common ground that he was till his death a proper party to the suit in the full sense of the term. The point here however is that when he died, so far as his interests were concerned, there was no party to the suit left, against whom a decree of any sort or kind could be passed 14 months later without pro-

ceedings under O. 22, R. 4, being first taken. It follows from the hypothesis that there is a distinct line of cleavage between the two sets of cases referred to above, in the first set of which there is no entity left on the record against whom a decree can be passed and in the second set of which there are persons in being against whom a decree, though an irregular or voidable or invalid decree, may be passed. The present case falls within the former category. The language of the decisions varies in classifying the two kinds of decrees as void or voidable, as with or without jurisdiction, and as a decree or that which only purports to be a decree; but the principle remains ever the same. In cases like the one before us that which purports to be a decree was really passed only against a name on the record, the person behind that name having passed beyond the jurisdiction of all Courts. There remained on the record at the time of the decree, so far as Raghu Lall's property was concerned, no person who could be rendered amenable to the mandate of the Court in what purported to be its decree.

For the above reasons I hold that the appellant's contentions are well founded and would remand the case for a finding by the learned Subordinate Judge as to the objector's allegations of fact with respect to which there has so far been no inquiry.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 441

DAWSON-MILLER, C. J. AND FOSTER, J.
Sheo Balak Singh and others—Plaintiffs—Appellants.

v.

Radhey Singh and others—Defendants—Respondents.

Second Appeal No. 470 of 1918, Decided on 29th July 1919, from the decision of Sub. Judge, Gaya, D/- 24th September 1917.

Landlord and Tenant—Ijaradar can induct tenant on land in absence of stipulation to contrary—Settled raiyats inducted as tenants acquire occupancy rights.

An ijaradar has power to induct a tenant on to the land which is the subject of his ijara, apart from any stipulations in his document of title which may prevent him from so doing; and where there are no such stipulations and the persons inducted are settled raiyats of the village in which the land is situated, once they become tenants under the ijaradar they acquire an

occupancy right in the land which they hold under the ijaradar. [P 441 C 2]

Panchanan Banerji—for Appellants.
P. N. Singh—for Respondents.

Dawson-Miller, C. J.—This is an appeal by the plaintiffs, the maliks of the land in suit, from a decision of the Subordinate Judge of Gaya, dated 24th September 1917. The question in dispute between the parties is whether defendants 1 to 5 have acquired occupancy rights in certain land the proprietary interest of which is in the plaintiffs. The learned Subordinate Judge, after dealing with the evidence in the case, has come to the conclusion, as a finding of fact, that the plaintiffs have failed to satisfy him that the Record of Rights finally published on 5th April 1916, which is in favour of the defendants' case has been rebutted by the evidence adduced on behalf of the plaintiffs. That is a finding of fact by which this Court in second appeal is bound, but it is contended, in the first place, that the defendants acquired their title from an ijaradar and that, having been put in possession of the land by the ijaradar, their interest, whatever it may be, ceased when the ijaradar's term expired and that the landlords were thereupon entitled to eject them claiming as they do this land as their bakasht land. In order to support that proposition, the learned vakil for the plaintiffs has been driven to contend that an ijaradar has no power whatever to induct a tenant on to the land, but in support of this proposition he has been unable to produce any authority whatsoever. I have no hesitation in holding that an ijaradar has power to induct a tenant on to the land which is the subject of his ijara, apart from any stipulations in his document of title which may prevent him from so doing. In the present case it has not been shown that there were any such stipulations and as the defendants were settled raiyats of the village in which the land is situated, it seems to me that once they became tenants under the ijaradar they acquired an occupancy right in the land which they held under the ijaradar. So far as that is concerned I think that this appeal must fail.

The next question which was raised was one of estoppel. It appears that three ijara deeds were produced and these are dated respectively June 1894, June 1906 and January 1907. The first

is an ijara deed executed by the plaintiffs in favour of certain ijaradars therein named. The second is a transfer of the same right by the original ijaradars to others, and the third is a re-transfer of the same right to the present defendants. According to the description of the boundaries of the land therein transferred under the ijara deeds it is sought to be made out that the lands in suit or some of them were in fact the lands in khas possession of the plaintiffs. The land which was the subject of the ijaras mentioned was a survey plot numbered 550 and the boundaries of that plot on the north and east are described as the kasht of the executant; that is to say, under the first deed of the plaintiffs and under the subsequent deeds, although the word "executant" is not used, the plaintiffs' names are mentioned. It is said that, as the defendants took a transfer of this land, they are estopped from contending that the boundaries therein described in the ijara are not accurate. In the first place, as pointed out by the Subordinate Judge, the boundaries which are relied upon are those to the east and the north, and on looking at the survey map, it appears that none of the plots which are described as the kasht land of the maliks are amongst the five plots in dispute except one. Of these five, Nos. 540 and 541 do not adjoin plot No. 550 at all. Plots Nos. 551 and 552 do adjoin plot No. 550 which was the subject of the ijara, but on that boundary the land is not described as the kasht land of the landlords.

The other one which is No. 539 does adjoin No. 550 and it is described as the kasht land of the landlords. But, for reasons which the learned Subordinate Judge gave he came to the conclusion that this matter was not in itself sufficient to rebut the clear evidence adduced by the Record of Rights and the way he dealt with it is this: that the original ijara which was not granted to the defendants at all contained a description given by the plaintiffs and that clearly the defendants could not be bound by that; that the subsequent ijaras, which were a transfer of the plot in question, were merely a repetition, so far as the boundaries went, of what was contained in the original ijara, and that, whether they were originally right or whether they were originally wrong, there was

nothing to show that at the date when the final transfer was made in 1907, the description of the boundaries therein mentioned, being merely a repetition, was accurate so far as it related to the plot in question. But it is contended that the defendants having taken this document are estopped from denying the accuracy of it. It is unnecessary to decide that question, because an estoppel, if such existed, would merely be to this extent: that in the year 1907, one plot of the disputed land was in the khas possession of the maliks. Now the Record of Rights was published long after that, in the year 1916, and it seems to me that even if there should be an estoppel as against the defendants in this case from denying the accuracy of a document of the year 1907, that is not sufficient to rebut the evidence of the Record of Rights published in the year 1916. For these reasons I have come to the conclusion that the finding of the learned Subordinate Judge, even if it may not have rightly decided the question of estoppel about which it is unnecessary to form any opinion, would not in fact make any difference to the ultimate decision seeing that in any event the estoppel, if such exists, does not go really far enough. For these reasons I am of opinion that this appeal should be dismissed with costs.

Foster, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 442

ATKINSON and DAS, JJ.

Parmod Banabihari—Plaintiff—Appellant.

v.

C. G. Atkins and others—Defendants—Respondents.

Appeal No. 212 of 1917, Decided on 27th March 1919, from original decree of Sub-Judge, Monghyr, D/- 29th June 1917.

(a) **Hindu Law—Religious endowment—Validity—There must be complete dedication—Income not proved to be applied to idol—Conduct of parties inconsistent with trust—In such case subsequent grant by Hindu widow does not confer any valid title on idol.**

A dedication in favour of an idol to be effectual must be real and not nominal, and it must be shown that the grantor completely divested himself of every portion of the property which is the subject-matter of the grant. Where there is no proof that the income of the property endowed is applied for the maintenance of the idol, and the whole conduct of the parties is, inconsistent with the hypothesis of a valid trust, the dedication must be held to be nominal and

where this is so, a subsequent grant made by a female having the estate of a Hindu mother cannot create a valid title in favour of the idol, and therefore the idol cannot maintain a suit in ejectment. [P 444 C 1]

(b) **Lease—Construction—Lease to firm—Original grantees continuing members of firm can acquire occupancy rights—Suit to eject is barred after 6 months of expiry of lease by virtue of Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 1.**

A lease in favour of a firm or a concern must be taken to be a lease in favour of the individuals constituting the firm, and in the absence of anything to show that the original grantees are no longer members of the firm, there is nothing to prevent them from acquiring occupancy rights.

Certain land was leased to a firm: the lease expired in 1905, but the firm continued in possession of the land. On the 1st April 1915 they were served with notice to quit but they disregarded the notice. On the 24th January 1916 the present suit was brought to eject them:

Held: (1) that the suit having been brought more than six months after expiration of the lease, was barred by the special rule of limitation prescribed by Art. 1 (a) of Sch. 3, (2), that the firm had acquired a right of occupancy in the land in dispute. [P 443 C 2 P 445 C 2]

Lachmi Narain Sinha and Jagannath Prasad—for Appellant.

Manuk, C. M. Agarwala and Panchanan Banerjee—for Respondents.

Das J.—This appeal comes before us from the judgment of the Subordinate Judge of Monghyr and arises out of a suit instituted by Rani Ranjit Kuer, the present proprietress of the Narhan Estate, as the shebait of an idol, for a declaration that 75 bighas 11 kathas 1 dhur of land, forming part of Mauza Narayanpur, is the khudkasht land of the malik, and that the defendants, as the partners of a concern known as Daulatpur Factory, have not acquired a right of occupancy therein, and for khas possession thereof.

The plaintiff's case is that village Naryanpur was purchased by Mt. Ram Kuari, the wife of Babu Ranjit Singh, the then holder of the estate, out of her separate funds, and was dedicated by her to the family idol some time in 1237. The original grant, as contained in the copperplate, has been produced in this case, and it does not appear that it lays down any rule of succession to the office of the shebait. According to the plaintiff the income of the village was always appropriated to the use of the idol, although it is admitted that the Narhan Estate always stood recorded as the proprietor of the village in the Land Registration Department. The Court of Wards, who were long

in possession of the estate, first on behalf of Babu Barham Narain Singh, then on behalf of his widow Mt. Biseswari Kueri, and lastly on behalf of his mother, the present proprietress, always treated Mauza Narayanpur as part and parcel of the estate, but they released the mauza on discovery of the copperplate, which discovery took place some time in July 1912.

On 1st September 1914 Rani Ranjit herself executed a fresh deed in favour of the idol, and there is some contention before us whether this constitutes a fresh grant in favour of the idol or whether it merely confirms the original grant made by Mt. Rani Kueri.

The plaintiff's case is that the mauza of which the defendants are admittedly in possession is the khudkasht land of the idol, and that the defendants have not acquired any right of occupancy therein. On 1st April 1915 the plaintiff served on the defendants a notice to quit, which was disregarded by the defendants. On 24th January 1916 the present action was brought.

Now this appeal may be disposed of on a very short point. It is practically conceded by the learned vakil appearing on behalf of the appellant that if the Full Bench of this Court has decided the case of *Janki Singh v. Mahant Jagannath Das* (1) correctly, then the plaintiff's suit having been brought more than six months after the expiration of the lease is barred by the special rule of limitation provided by the Bengal Tenancy Act. But he argues that that case was wrongly decided and is at present before the Judicial Committee. So far as we are concerned we are conclusively bound by the Full Bench decision and must hold that the plaintiff's suit is barred by limitation. But as various other questions have been argued before us we think it right and proper to deal with them.

The first question that arises is what is the title of the idol which enables it to maintain an action in ejectment. The only evidence of an endowment in favour of the idol is a copper plate which was discovered in an iron safe where the late Rani's ornaments were kept but a dedication to be effectual must be real and not nominal, and it must be shown that the grantor completely divested herself

(1) [1913] 3 P. L. J. 1, = 44 I. C. 94

of every portion of the property which is the subject matter of the grant. In the case of *Madhab Chandra Bara v. Sarat Kumari Debi* (2), which was a case of a public endowment it was laid down by their Lordships that to support the case relied on that the lands in suit formed the subject of a valid public endowment it must be established that an absolute grant was in the first place, made with the intention that the properties should be applied for the service of the idol, and that the properties have since been so applied, and that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their benefit. In my opinion the same considerations must apply only with greater force to the case of a private endowment which it must be remembered can be put an end to by the consensus of the family, and the dedication must be held to be nominal when there is no proof of the application of the income of the property endowed for the maintenance of the idol, and when the whole conduct of the parties is inconsistent with the hypothesis of a valid trust.

In this there is no evidence that the income of the village was ever applied for the maintenance of the idol; there is on the other hand positive evidence on the record and that from the side of the plaintiff herself, that Mt. Ram Kuari herself treated this property as belonging to her. The property has always stood recorded as I have said before in the name of the estate in the Land Registration Department and the mode of dealing with the property by the parties interested in the endowment shows conclusively that they regarded the property as belonging to the estate. It seems to me that the original endowment was altogether ineffectual and that the trust in favour of the idol was never brought into existence. If the original endowment was ineffectual then the subsequent grant by Rani Ranjit Koer having the estate of a Hindu mother cannot create a valid title in favour of the idol. It follows therefore that the idol cannot maintain a suit in ejectment. The principal question of fact in this case is: Are the lands, subject matter of the suit the proprietor's private lands so as to

prevent the accrual of a right of occupancy therein. Mr. Manuk's argument is that under the combined operation of Ss. 20 and 21, Ben. Ten. Act the defendants would have a right of occupancy in the land unless it can be established (1) that the land has been cultivated as *zerait* land by the proprietor himself with his own stock and by his own servants or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act or that the land is recognized by village usage as proprietor's private land and (2) that the land is held under a lease for a term of years or under a lease from year to year.

It is Mr. Manuk's argument that S. 120, Ben. Ten. Act gives a convenient definition of 'proprietor's private land' but that S. 116 of the Act is the substantive section that deals with the non-accrual of a right of occupancy in a proprietor's private land and that in order to establish such non-accrual, it must be shown as a condition precedent that the land is actually held under a lease for a term of years or under a lease from year to year.

In this case the lease in favour of the defendants expired in 1905. The suit was brought in 1916. Between 1905 and 1916 the defendants have been in actual possession of the land without a lease, and it seems to me that the essential condition for non-accrual of a right of occupancy is not satisfied. Mr. L. N. Sinha however, argues that it must be presumed that the tenant has held over on the same terms and conditions, and that therefore he has in effect held under a lease from year or for a term of years. This argument has great force, for it has been held that all that the landlord need prove on this point is that when the holding was first created it was held under a lease for a term of years or from year to year. It is, however unnecessary to come to a definite conclusion on this point, because I am satisfied that the plaintiff has failed to establish that the land is the proprietor's private land within the meaning S. 120, Ben. Ten. Act. There is no evidence worth the name that the land has been cultivated by the proprietor himself with his own stock by his own servants or by hired labour for twelve continuous years immediately before the passing of Ben. Ten. Act, and it is not suggested that

(2) [1910] 6 I. C. 26.

the land is recognized by village usage as the proprietor's zeraït. Mr. L. N. Sinha relies on two circumstances in support of his contention. First, on the patta granted by Babu Parmeshwar Narain Singh, the then holder of the estate, on 11th February 1872 coupled with a letting by Poshat Jha in favour of Daulatpur Factory on 27th March 1873 for cultivating purposes; and, secondly, on the admission of the defendants that the land is the zeraït land of the malik.

I am of opinion that there is no force in this contention. The fact that the plaintiff's predecessor-in-interest was letting out a portion of the village for cultivating purposes in my opinion leads to nothing at all, and the admission of the defendant that the land is the zeraït of the malik must be taken with all other facts, admitted or proved in the case, before it is possible for us to arrive at a definite conclusion. It is admitted that the finally published Record of Rights, which was promulgated after the admission made by the defendants, is against the contention of the plaintiff, and the plaintiff has given no evidence whatever to discharge the heavy onus that is on her to bring her case within S. 120, Ben. Ten. Act; I hold therefore that the land which is the subject-matter of this suit is not the zeraït land of the plaintiff. It was next contended by Mr. L. N. Sinha that in any case the defendants, being a concern or a firm, are incapable of acquiring a right of occupancy in any land, and reliance was placed on the case of *Cannan, Liquidator Agra and Masterman's Bank v. Kylash Chunder Roy Chowdhry* (3), *Rai Komul Dossee v. J. W. Laidly* (4) and *Bujrangi Raut v. M. H. Mackenzie* (5). The first two cases were decided under the old Rent Acts which contained no definition of a raiyat, but the word has now been defined in the Bengal Tenancy Act to mean:

"Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such a right."

It is impossible to hold now that the members of a firm are incapable of acquiring a right of occupancy in the land. The two earlier cases were considered in

the case of *Laidley v. Gour Gobind Sankar* (6), and it was there pointed out that, so far as the first case was concerned, the report did not show the particular facts on which the decision was based, and with reference to which the observations of the learned Judges were made, and, so far as the second case was concerned, the observations on which the plaintiff relied were obiter dicta and were not necessary for the decision of the case. The Court came to the conclusion that a lease in favour of a firm or of a concern must be taken to be a lease in favour of the individuals constituting the firm, and as there was nothing to show in that case that the original grantees were no longer members of the firm, there was nothing to prevent them from acquiring a right of occupancy in the land. In the case before us the last lease in favour of the Daulatpur Factory is dated 22nd May 1900, and there is nothing to show that the original grantees are no longer members of the firm. There is, on the other hand, a clear admission by the plaintiffs in their plaint that the original grantees are still the members of the firm. This case was again considered in *Bujrangi Raut v. M. H. Mackenzie* (5), wherein its authority was not in any way shaken. The facts in the latter case were entirely different. The names of the original grantees in that case were unknown and the person who claimed to have acquired a right of occupancy in the land was some one different from the original grantees. It is obvious that that case can have no application to the facts of the case before us. I hold that the defendants have acquired a right of occupancy in the land in dispute. This appeal therefore fails, and I would dismiss it with costs.

Atkinson, J.—I agree.

V.S./R.K.

Appeal dismissed.

(6) [1885] 11 Cal. 501.

A. I. R. 1919 Patna 445

DAS, J.

Ram Nandan Sahay and others—Appellants.

v.

Jai Gobind Pandey and others—Respondents.

Appeals Nos. 41 and 42 of 1918, Decided on 24th July 1919, from appellate decrees of Sub-Judge, 1st Court, Chapra, D/- 18th September, 1917.

(3) [1876] 25 W. R. 117.

(4) [1879] 4 Cal. 957.

(5) [1908] 7 C. L. J. 475.

(a) **Cosharer**—Joint property alleged to be dealt by one co-owner without consent of others—Before order restoring property to former condition can be obtained co-owner must show some injury materially affecting his position.

Before a Court will, in the case of cosharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the others should be restored to its former condition, the plaintiff must show that he has sustained by the act he complains of some injury which materially affects his position. [P 446 C 2]

(b) **Cosharer—Ouster—Denial of title of one co-owner by other co-owners amounts to ouster—Such co-owner is entitled to joint possession.**

Where there is a denial of the title of one co-owner by the other co-owners there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. [P 447 C 1]

Jaganath Prasad—for Appellants.

B. N. Mitter and Bankin Ch. De—for Respondents.

Judgment.—These analogous appeals arise out of a suit in ejectment brought by the appellants against defendants 1 and 2. The appellants are the proprietors of Tauzi No. 3142. Defendant 3 is the proprietor of Tauzi No. 3143. Defendants 1 and 2 have a house on plot 342 which admittedly lies in Tauzi No. 3143. They have erected a wall and a chabutra on 7 dhurs of land in plot No 341 which adjoins plot 342, and it is in respect of this trespass on plot 341 that the plaintiffs complain. The lower appellate Court has found that plot 341 is joint between the plaintiff and defendant 3 and that there has undoubtedly been an encroachment by defendants 1 and 2 on 7 dhurs of land in plot 341, but that such encroachment has taken place by the leave and license of defendant 3. It has also found that the land encroached upon falls far short of the area which defendant 3 would be entitled to on partition, and that the plaintiffs have not suffered any substantial injury by reason of such encroachment. On these findings the Courts below have given the plaintiffs a decree for joint possession with the defendants, but have refused to eject defendants 1 and 2 from the land.

I am of opinion that the Courts below have taken an entirely correct view of the law on the subject. The authorities, I think, establish the proposition that, before a Court will, in the case of cosharers, make an order directing that a portion of the joint property alleged to

have been dealt with by one of the co-owners without the consent of the other should be restored to its former condition a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. See *Nocury Lall Chuckerbutty v. Bindabun Chendur Chuckerbutty* (1), *Shamnugger Jute Factory Co., Ltd. v. Ram Narain Chatterjee* (2), *Joy Chendar Rukhit v. Bippro Churn Rukhit* (3), *Brahmamoyee Chaudhurani v. Gopi Mohan Rai Chowdhury* (4) and *Paras Ram v. Sherjit* (5). It was contended by Mr. Kulwant Sahay on behalf of the appellants that the lastmentioned case was virtually overruled by the Full Bench of the Allahabad High Court in the case of *Shadi v. Anup Singh* (6). In that case it was found by the final Court on facts that the defendant was building upon land which was in excess of the share that would come to him on partition, and that on partition the plaintiff could not be adequately compensated. Therefore the plaintiff succeeded in establishing that, by the act complained of, he did sustain an injury which materially affected his position. The actual decision therefore is consistent with the rule which I have deduced from the cases and falls within the ambit of that rule, but there are certain observations in the leading judgment of Edge, C. J., which support the arguments put forward on behalf of the appellants. So far as these observations are concerned, all that I say is that they were not necessary for the decision of the case and that, with great respect, I am unable to adopt them for the purposes of this decision. The next case relied upon by Mr. Kulwant Sahay is that of *Shibba Mal v. Naurang Mal* (7). That was a suit by the plaintiff for the removal of a balcony which the defendant had built projecting over considerable width of a passage which was the joint property of the plaintiff and the defendant. Walsh, J., thought, that as the plaintiff had failed to show that he had sustained any injury by the act of the defendant, there could not be a mandatory injunction compelling the

(1) [1882] 8 Cal. 708.

(2) [1887] 14 Cal. 189.

(3) [1887] 14 Cal. 236.

(4) [1910] 7 I. C. 124.

(5) [1887] 9 All. 631.

(6) [1890] 12 All. 436 (F. B.).

(7) [1917] 39 I. C. 739.

defendant to remove the balcony. Richards, C. J., and Bannerji, J., took a different view on appeal. In view of the long series of decisions both of the Calcutta High Court and Allahabad High Court, not one of which was considered or even referred to in the judgment delivered by Richards, C. J., I am unable to follow that decision. I am of opinion, therefore that if the case had arisen between the plaintiffs and defendant 3, the plaintiffs could not have asked for a mandatory injunction compelling defendant 3 to pull down the erections on 7 dhurs of land. In my judgment it makes no difference that the wall and the chabutra have been erected, not by defendant 3, but by defendants 1 and 2 by leave and license of defendant 3 for it is well settled that one joint owner "might license the doing of whatever he might do himself" See *Wilkinson v. Haygarth* (8), *Job v. Pottom* (9), *Jacobs v. Swards* (10), and *Sat Narayan Singh v. Anant Prasad* (11).

It is suggested however by Mr. Kulwant Sahay that, as there is a denial of the plaintiff's title to plot 341, not only by defendants 1 and 2, but also by defendant 3, there is some sort of equity in favour of the plaintiffs which would entitle them to the mandatory injunction asked for. There is in my judgment, neither principle nor authority in support of this proposition. All that the cases lay down is that where there is a denial of the title of one co-owner by the other co-owners there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. In this case the plaintiffs have got a decree for joint possession. But they go further and the point that has been argued on their behalf is that where a co-owner A in denial of the title of co-owner B allows a stranger C to erect a building on the land jointly held by A and B, B is entitled, by reason of the denial of his title, to a mandatory injunction, compelling C to demolish the building so erected. In my judgment the solution of the problem must still depend on whether any substantial injury has been sustained by B, and the Court will proceed to solve the

problem unhampered by any consideration of the denial of the plaintiff's title. In this case the Courts have concurrently come to the conclusion that the plaintiffs have sustained no injury whatever by the erection of a wall and chabutra on seven dhurs of land. On this finding the plaintiffs' suit for demolition of the wall and chabutra must fail.

The only other question that has been argued before me is that the lower appellate Court erred in setting aside the finding of the Court of first instance on the question of the shares held by the plaintiffs and defendant 3 respectively in plot 341. For the reasons which have been given by the learned Judge on appeal, I am of opinion that it was not necessary for the Court of first instance to record any finding on that point. The result is that these analogous appeals fail and must be dismissed with costs.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 447

JWALA PRASAD AND FOSTER, JJ.

Badri Chaudhuri and others—Plaintiffs—Appellants.

v.

Harbans Jha and others—Defendants—Respondents.

Appeals Nos. 141 and 155 of 1918, Decided on 16th August 1919 from appellate decree of Dist. Judge, Darbhanga.

Adverse Possession—Fraudulent transferor continuing in possession for more than 12 years is entitled to declaration or recovery of possession even if fraud carried out—Fraud.

Where the owner of property executes a fraudulent transfer thereof from some ulterior motive but continues in possession of the property for more than 12 years, he is entitled not only to confirmation of possession but to recover possession if he subsequently loses it, even though the fraud intended to be effected was effected. [P 451 C 1,2]

Sultan Ahmad and Murari Prasad—for Appellants.

K. B. Dutt and L. K. Jha—for Respondents.

Jwala Prasad, J.—The plaintiffs are appellants in this case. Plaintiffs 1 and 2 are the sons of one Mohan Lal. Plaintiffs 3 and 4 purchased a portion of the property from plaintiffs 1 and 2 by means of a *kahala*, dated 26th April 1912. The plaintiffs brought the present suit for confirmation of possession and in the alternative for recovery of possession of the properties in suit on declaration of their title thereto and on holding that

(8) [1847] 12 Q. B. 837.

(9) [1875] 20 Eq. 81.

(10) [1872] 5 H. L. 464.

(11) [1919] 51 I. C. 31.

the defendants are merely farzidars having no title in the properties in suit, nor have they ever been in possession thereof. Mohan Lal, the father of plaintiffs 1 and 2, executed an unregistered mortgage bond in the Farzi name of Babunandan Jha on 25th Chait 1256. Babunandan Jha on the basis of the said mortgage obtained a Farzi decree in execution of which he purchased the properties in suit on behalf of Mohan Lal. These properties consisted of some shares in four villages; 7 gandas 2 cowris share pokhta out of 16 annas share of Mauza Machheta, Tauzi No. 3403, and 13 gandas 1 cowri and 1 K. pokhta out of 16 annas of a mauza called Awksi Madhubani, bearing Tauzi No. 3490, 5 gandas 3 cowris pokhta share in Mauza Nadiani, Tauzi No. 13466, and 4 gandas pokhta share in Mauza Nadiani bearing Tauzi No. 3431. The latter two shares in village Nadiani are covered by Suit No. 353, Second Appeal No. 155. The shares in the former two are covered by Suit No. 311, Second Appeal No. 141. The facts giving rights to the cause of action in both the suits are almost the same. The suits and the appeals in the Courts below were tried analogously and consequently the second appeals in this Court were heard together and it will be sufficient to dispose of all these second appeals by one judgment.

The plaintiffs' case is at that time when the mortgage bond was executed in the Farzi name of Babunandan Jha, who was the father's sister's son of Mohan Lal, there was a decree for rent against Mohan Lal of the Maharajah of Darbhanga amounting to Rs. 7,000. The said bond was executed in order to save the properties from the Court sale in execution of the said decree of the Maharaja of Darbhanga. The decree of Babunandan Jha and the subsequent auction sales in execution thereof were all the result of the same intention and have been styled in the plaints as "collusive transactions." The translation in the paper book of the plaint is not accurate. In para. 5 of the plaint it is stated that in order to maintain the Farzi nature of the transactions defendants 1's name was designedly recorded in the Collectorate in respect of the said shares. The plaintiffs assert however that in spite of the said Farzi transaction the plaintiffs' ancestor and thereafter the

plaintiffs continued to be in possession of the properties, in suit, and in the year 1900, when the survey operations were undertaken, the plaintiffs preferred an objection to the survey authorities praying that their names be entered in the survey records and the names of the defendants be expunged. The survey authorities in respect of all the villages in question found that the transactions by virtue of which the names of the defendants or their ancestors were recorded in the Collectorate were all benami and Farzi and that the title remained all along with Mohan Lal and, after his death, with the plaintiffs. In respect of the villages comprised in Suit No. 311 corresponding to Appeal No. 141, the survey authorities definitely came to the conclusion after inquiry on the spot that the said shares were all along in the uninterrupted possession of the plaintiffs and the defendants had never been in possession of the said shares by virtue of the Farzi entries in the Government records or on the strength of the auction purchase.

In respect of the properties comprised in Suit No. 303 corresponding to Appeal No. 155, the assistant settlement officer found that Mohan Lal was in possession of the lands but Harbans Jha, son of Babunandan, was collecting rents in respect of the lands held by the defendants. The survey authorities however did not actually cause mutation of names, inasmuch as the names of the defendants were recorded in Register 'D' of the Collector but made a note of the aforesaid findings in the khewat prepared by them. Thereafter the plaintiffs applied in the Collectorate for mutation of their names in place of the names of the defendants, but their application was rejected on 5th May 1913 in respect of the villages in Suit No. 311 and on 21st May in respect of the villages in Suit No. 303. On the strength of the orders of the Land Registration Deputy Collector the defendants caused some interference in the possession of the plaintiffs. The plaintiffs accordingly brought the present suits for declaration of their title and for a further declaration that the defendants were mere Farzidars, and for confirmation of their possession. The defendants are the descendants of Babunandan Jha. They resisted the plaintiffs' claim. The name of Babunandan Jha in whose name

the mortgage bond was executed and the property was purchased at the auction-sale was originally recorded in the Collectorate in respect of the properties in suit. After his death his two sons by different wives, Harbans Jha and Chatur Jha, were recorded in the Collectorate in place of Babunandan Jha. The suits have been brought against Harbans Jha and Makund Jha, son of Chatur Jha, and their respective descendants. Two written statements were filed in the suits one on behalf of the defendants 1, 3, 4, 5, 6, 7, 8, 9, 10 and 11 and the other on behalf of Makund Jha, defendant 2. But the pleas taken in the written statements are practically the same in both. The defendants denied that Babunandan Jha was the Farzidar of the plaintiffs' ancestor Mohan Lal and asserted that the mortgage-bond, the decree and the auction-purchase in execution of that decree were all bona fide and that Babunandan Jha purchased the properties for himself and that he was in possession of them in his own right and after his death the defendants have been in possession of the properties in suit. The pleas taken by the defendants were that the suits were barred by Ss. 66 and 47, Civil P. C. and by limitation. Upon the pleas of the defendants among others the following issues were framed by the learned Munsif : (1) Are these suits barred by Ss. 66 and 47, Civil P. C. ? (2) Are the defendants of these suits Benamidars of the plaintiffs ? (3) Can these suits for confirmation of possession lie ? (4) Have the defendants acquired any right to the disputed properties by adverse possession for over 12 years ?

The Munsif decided the aforesaid issues in favour of the plaintiffs and against the defendants. The Munsif found that the mortgage-bond of 1869 was merely a "paper transaction" and that the decree obtained on the basis of the mortgage was only a collusive one and that it created no right in favour of the defendants. He also held that Mohan Lal and thereafter the plaintiffs have been in possession of the disputed properties all along and that the said transactions in the name of Babunandan Jha, the ancestor of the defendants, did not in fact cause any change in the title or possession of the properties, which the plaintiffs had prior to and at the time of the said transactions. He overruled the de-

fendants' pleas in bar and held that the suit was not barred by limitation, nor was the suit affected by Ss. 66 or 47, Civil P. C. He accordingly decreed the suit of the plaintiffs, declaring their title to the lands in suit and confirming their possession.

On appeal by the defendants the learned Judge agreed with the Munsif so far as the findings regarding the pleas in bar were concerned. The only point that was pressed before the learned Judge on behalf of the appellants was that the suits did not lie. The learned Judge upheld this contention on the ground that the plaintiffs' ancestor executed the mortgage-bond and caused the property to be sold and purchased in the name of Babunandan Jha, the defendants' ancestor with the view of defrauding the creditor, the Maharaja of Darbhanga, in respect of the decree of rent already obtained and that the intended fraud was carried into effect inasmuch as the decree of the Maharaja of Darbhanga was only partially realized and the rest was time-barred. The learned Judge, therefore, held that the plaintiffs were not entitled to a declaration that the said transactions were Benami and he accordingly upset the decision of the Munsif and dismissed the suit of the plaintiffs.

Against that decision the plaintiffs came in second appeal to this Court. In order to dispose of the appeal this Court thought it necessary to have the decision of the Court below on two issues of facts, and accordingly by its order of 14th March 1919 the case was remanded to the Court below for a determination of the issue framed by this Court. The issue was :

"The plaintiffs' cause of action being dated 5th May 1913 with regard to a declaration which they desire and 15th Chait 1321 with regard to the actual dispossession against which they seek relief, were the plaintiffs in possession of the land adversely to the defendants for 12 years prior to 5th May 1913, or for 12 years prior to 15th Chait 1321 ?"

The learned Judge has now remitted his decision upon the said issue in a very careful and detailed judgment. He has come to a clear and definite finding of fact which may be quoted as follows:

"The respondents never had a good title and were never in possession of the disputed properties. There can be no reasonable doubt that the whole series of transactions was Farzi, and I accordingly find that the appellants have been throughout in possession of the properties in

suit adversely to the defendants-respondents down to the date of their dispossession on or about the 15th Chait 1321.

The learned counsel on behalf of the respondents contends that this finding of fact though against the respondents, does not entitle the plaintiffs to a decree in the suits and that in spite of the aforesaid findings the judgment of the District Judge before remand should be upheld. Reliance has been placed by the learned counsel upon the decision of their Lordships of the Judicial Committee in the case of *Petherpermal Chetty v. Muniandy Servai* (1). The actual decision in that case was that where the purpose of the fraud is not effected, there is nothing to prevent the plaintiff from repudiating the transaction as benami and recovering possession of the property. Lord Atkinson in delivering the judgment observed as follows:

"To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with."

Applying this Mr. Dutt on behalf of the respondents says that according to the findings of the District Judge in this case, the intended fraud to defeat the creditor was carried into action and hence the plaintiffs cannot seek the assistance of the Court to give a decree to them in respect of the property in suit. The principle will apply only when the plaintiff seeks to receive possession of properties lost by him on account of his fraudulent and benami transaction. In the present case the plaintiffs do not invoke the aid of the Court to restore them to possession of the property which they lost by virtue of the Farzi transactions. The plaintiffs' case is that no change in the status quo of the properties in any way occurred on account of the said transactions and that as a matter of fact there was no transfer of the properties in question to the defendants, but that there was only a paper transaction and as that paper transaction was threatened to be used by the defendants against their undisputed title and the possession which have been found concurrently by the Courts below in their favour, the plaintiffs simply want a declaration of the true existing state of affairs, namely that they are the real beneficial owners of the

properties and they have been in possession all along of the properties and that the defendants have no concern at all.

The case of *Banka Behary Dass v. Raj Kumar Dass* (2) no doubt lends some colour to the contention of the learned counsel. But in the case of *Jadu Nath Poddar v. Rup Lal Poddar* (3), after a detailed review of the authorities on the subject, Mookerjee, J., declined to accept entirely the broad proposition laid down in the case of *Banka Behary Dass v. Raj Kumar Dass* (2) and at p. 983 of the judgment observed:

"With all respect I am unable to see how the view taken by this Court in the case of *Banka Behary Dass v. Raj Kumar Dass* (2) enables a party to a dishonest trick by which his creditors may have been defrauded to get himself reinstated when his purpose has been served. On the other hand, it seems to me that if the Court refuses to aid the plaintiff who has made a fictitious transfer of his property from an improper motive but has not carried into effect his intention, the Court really becomes an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff."

Even if the proposition laid down in *Banka Behary Dass v. Raj Kumar Dass* (2) be accepted, the case is distinguishable from the present one, inasmuch as the defence taken in that case was that after the Farzi conveyance in question two of the creditors of the plaintiffs attached some of the property conveyed to which the defendants preferred a claim and the properties were released from the attachment. In the present case the defendants have not raised any such plea. Their defence throughout has been that there was no decree of the Maharaja of Darbhanga and that there was no intention to defraud any creditor by means of the mortgage and the decree in question. The plaintiffs also did not make any such allegation in the plaint that any creditor was as a matter of fact defrauded or that the object of the fictitious transaction was to defraud any creditor of the mortgagor Mohan Lal. All that the plaintiffs averred is that there was at the time the mortgage bond was executed a decree of the Maharajah of Darbhanga and in order to save the properties from the sale the said mortgage bond was executed in the Farzi name of the defendants' ancestor Babunandan. There was no issue raised in the trial Court as to whether the fraud was carried into effect

(2) [1900] 27 Cal. 23.

(3) [1906] 33 Cal. 967.

(1) [1908] 35 Cal. 551=35 I A. 98 (P. C.).

and whether the Maharaja of Darbhanga or any other creditor of the plaintiffs' ancestor was as a matter of fact defrauded by means of the said transaction. Upon the pleadings in the present case the decision in *Banka Behary Dass v. Raj Kumar Dass* (2) is distinguishable and cannot be applied, nor can it be held that the plaintiffs are not entitled to the declaration that they have sought in this case.

I do not think it was open to the District Judge, when it was neither the case of the plaintiffs nor of the defendants, nor was there any issue upon the point to hold that the fraud was carried into effect and the Maharaja of Darbhanga was defrauded in respect of his decree. We have looked into the sale certificates Exs. 23-K and 328 and the previous deposition of one of the plaintiffs, but we do not find anything in them to show that the Farzi transactions were used for the purpose of laying any claim in execution of the Maharaja's decree or that on account of the said transactions the execution of the decree failed. The endorsements simply show that the sale certificates were filed in some Court, but the nature of the case and the purpose of the filing are not shown. The order sheet in the claim case and the objections, if any, made to the execution of the decree were necessary to be filed to raise the plea. Again the depositions only show that a part of the decree was satisfied and the rest was time barred. There is a big gap to shew that the Farzi transactions in question were the cause of this result. There is no evidence thereof to show that the fraud was carried into effect and the aforesaid evidence relied upon can only be a matter of surmise and supposition. If the lower appellate Court thought that the point was necessary to be investigated into it ought to have framed an issue to allow the parties to give evidence on the point. If the finding of the Judge is not accepted, then there can be no question that the fraud was not carried into effect and hence upon the aforesaid authority of the Privy Council case of *Petherpermal Chetty v. Muniandy Servai* (1) the plaintiffs are entitled not only to confirmation of possession but to recover possession if they had lost possession on account of the Farzi transactions. Even if the finding of the learned Judge be

accepted as a finding of fact, the plaintiffs, being in possession for over 12 years, have acquired title by adverse possession and are entitled to the declaration sought for.

Again there was no question in the case of *Banka Behary Dass v. Raj Kumar Dass* (2) as to the effect of the continuous possession of the plaintiff for over 12 years' prior to the institution of the suit. The Farzi conveyance in that case was executed in 1889 and the suit was brought in 1893. During a short period of four or five years no question of acquisition of title by virtue of adverse possession of any of the parties could arise. In the present case plaintiffs have been in possession of the properties from 1859 up to the present moment, a period of 60 years, not to speak of 12 years which under S. 28, Lim. Act, is sufficient not only to extinguish the right and title of a person to a property but to create a complete title in favour of the person who has been in possession for over 12 years. The point appears to me to have been settled, and it is therefore needless to quote any authority in support of it. It is sufficient to quote the judgment of Mookerjee, J. in the case of *Nawab Bahadur of Murshidabad v. Gopinath Mandal* (4), where it was laid down that the effect of S. 28, Lim. Act, is not merely to extinguish the title of the rightful owner of the land, but also to create a title by negation in the occupant, in which he can actively assert if he loses possession even as against the true owner. That principle will apply with greater force in the case of a rightful owner being in possession of the property for over 12 years in spite of his having executed a Farzi transaction for some ulterior motive. The case of *Govinda Kuar v. Lala Kishun Prasad* (5) would seem to appear to be on all fours with the present case. In that case it was held that where the ostensible transferee never had any exclusive possession of the property in question, which was for a great many years treated as a part of the joint family property, and which was enjoyed by the joint family (of which the plaintiff was now the sole surviving member) for more than 12 years before suit, the plaintiff was entitled to have a declaration of his right to the property

(4) [1910] 6 I. C. 392.

(5) 28 C. 370.

and to confirmation of his possession thereof in spite of the fact that he had executed a colourable transfer for the purpose of defrauding his creditors and where his intention was wholly or partially carried into effect.

Mr. Dutt, however, seeks to distinguish this case by contending that in that case the property was joint family property and the fraudulent conveyance was by a member of the family. I fail to appreciate the distinction in principle. In the present case the plaintiffs' case is that their father was in possession of the property in suit and thereafter they have been in possession all along. This Court, while remanding the case for a finding upon the said issue, had clearly in view the principles enunciated in the case of *Govinda Kuar v. Lala Kishun Prosad* (5). It was then understood clearly by this Court and at the Bar that the finding of fact upon the issue remitted would dispose of the case and that if it was found by the Court below that the plaintiffs were in continuous possession for over 12 years before their possession was interfered with, they would be entitled to a decree in the suit. On fuller construction of the law on the subject and upon a true construction of the pleadings in the case the view taken by this Court before remand appears to have been confirmed. The plaintiffs are therefore entitled to the reliefs granted to them by the learned Munsif. The result is that the decision of the District Judge is set aside and that of the Munsif is restored. The appeal is allowed with costs of the remand and also those assessed in the decree.

Foster, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 452

DAS, J.

Lachmi Narain and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 120 of 1919, Decided on 2nd May 1919, against order of Sess. Judge, Patna.

(a) Criminal P. C. (5 of 1898), Ss. 103, 190 (1) (a) and 200—Excise Inspector entering house at sunset without search witness—Search made and opium found—Accused arrested and handed over to police—Investigation carried on by himself and opium retained and produced before Magistrate—

Report and charge sheet submitted—Magistrate taking cognizance treating report as police report and convicting accused—On revision, Magistrate held had no seizin of the case, no proper complaint being before him—Failure to examine under S. 200 vitiated proceedings—Conviction could also not be maintained—Entry after sunset offended—Opium Act (1 of 1878), S. 14—Entry without search witnesses contravened Criminal P. C. S. 103—Investigation by himself and not delivering opium at police station contravened S. 20, Opium Act—Opium Act (1 of 1878), Ss. 14 and 20.

A Sub-Inspector of Excise entered the premises of the accused after sunset where he suspected contraband opium had been secreted; after entering the premises he sent for two search witnesses. A search was made and some opium was found. The Sub-Inspector thereupon arrested the accused and took him to the police station, but conducted the investigation himself and retained the opium found on the premises, which he produced in Court when he made his statement. He submitted a report and charge sheet, and the Deputy Magistrate of the District took cognizance of the case, treating the report of the Excise Sub-Inspector as a police report, and convicted the accused under S. 9 (c), Opium Act. On appeal the Sessions Judge upheld the conviction, pointing out that the Excise Sub-Inspector's report was wrongly treated by the Magistrate as a police report, and that he must have taken cognizance of the case under S. 190 (1) (a), Criminal P. C. The accused moved the High Court on revision:

Held, (1) that the proceedings before the Magistrate were irregular, inasmuch as he was not properly in seizin of the case—there was no regular complaint before him, and, even if there was, his omission to examine the complainant on oath as required by S. 200, Criminal P. C. was an illegality which vitiated the proceedings.

(2) that apart from the foregoing, the conviction could not be maintained by reason of the following serious irregularities committed by the Excise Sub-Inspector, namely: (a) his entry of the premises after sunset in contravention of S. 14, Opium Act; (b) his entry of the premises without search witnesses in disregard of S. 103, Criminal P. C.; (c) his keeping the investigation in his own hands and not delivering up the opium found to the nearest police station, in spite of the peremptory provisions of S. 20, Opium Act. [P 454 C 1,2]

(b) Criminal P. C. (5 of 1898), S. 537—Proceedings are full of irregularities—Burden of proof of absence of prejudice is on prosecution.

Where proceedings bristle with irregularities, it is for the prosecution to show that the accused was not prejudiced thereby. [P 453 C 2]

Younus, P. S. Varma and Rajendra Prasad—for Petitioners.

The Govt. Pleader—for the Crown.

Judgment.—The petitioners have been convicted under S. 9 (c), Act 1 of 1878 by the Deputy Magistrate in charge of Patna City and sentenced to undergo rigorous imprisonment for six months. The ap-

peal to the learned Sessions Judge of Patna was dismissed. Shortly stated the facts are as follows: On 27th October 1918, Tirbeni, who is an Excise Sub-Inspector, happened to pass an opium shop in which the petitioners served as salesmen. He entered the shop, checked the opium and found that the opium in the premises tallied with the account-books. He says that he had some suspicion that there might be opium in an adjoining house and in company with another Sub-Inspector, who happened to come on the scene he entered the adjoining house and then sent the other Sub-Inspector, whose name is Warasat Hussain, to get two search witnesses, and then they went to a particular room, found five cakes of opium weighing two seers six chhataks, and arrested one of the petitioners Lachmi Narayan, the other petitioners Paras Singh having run away. He took Lachmi Narain to the police station, but conducted the investigation himself and submitted a report and a charge sheet upon which the learned Deputy Magistrate took cognizance. The first question that has been argued before me is that the learned Deputy Magistrate was not properly in seisin of the case. As I have mentioned before the prosecution was started on the report of Tirbeni and the learned Magistrate expressly states that he took cognizance on the report of Tirbeni, treating that report as a police report.

This is wrong, as the learned Sessions Judge in his appellate judgment points out. But the learned Sessions Judge, making entirely a new case on behalf of the learned Deputy Magistrate, says that he must have taken cognizance under S. 190 (1) (a), Criminal P. C. But it appears that if the Deputy Magistrate took cognizance of this case under S. 190 (1) (a) of the Code, he did not in fact examine the complainant as, in my opinion, he was bound to do under S. 200 of the Code. It has been urged before me by the learned Government Pleader that omission to examine the complainant on oath is a mere irregularity which does not vitiate the subsequent criminal proceedings. I have dealt with this identical point this morning in *Mangu Keeri v. Emperor* (1) (Criminal Revision No. 88 of 1919), and I have come to the conclusion that the examination of the com-

plainant on oath is not a mere formality, but a condition precedent which must be strictly complied with. In my opinion the filing of a petition of complaint is the act of the party, and it is incumbent on the Magistrate to show in some way that he intends to proceed with the matter, and the only way in which he can express that intention is by examining the complainant on oath. If authority is needed for the proposition, it will be found in the latest decision of this Court reported as *Jhuna Lal Sahu v. Emperor* (2). As a single Judge I am bound by the decision of this Court and agreeing with that decision I hold that the learned Deputy Magistrate was not properly in seisin of the case and that therefore all proceedings must be set aside.

But I do not rest my judgment on my view of law in this matter, because I am clearly of opinion that on facts there should not have been a conviction. The whole case must rest upon the evidence of the two Excise Sub-Inspectors, and it has been shown that they have been guilty of a series of irregularities which, in my judgment, have seriously prejudiced the petitioners. The whole judgment of the learned Sessions Judge is as serious an indictment of the methods adopted by Tirbeni as I have seen in the course of my experience and for the reasons which I shall presently give, it was, in my opinion, for the prosecution to show that having regard to the serious irregularities the accused were not prejudiced and that it was not for the accused to show that they were prejudiced. In the first place, in contravention of the provisions of S. 14, Opium Act, the Sub-Inspector entered the premises after sunset, which he had no right to do. In the second place, in contravention of S. 103, Criminal P. C., he entered the premises without any search witnesses. The learned Sessions Judge himself says that unless the accused can show how he has been prejudiced by these irregularities, the conviction should stand. In my opinion these are statutory safeguards for the protection of accused persons so that it may not be in the power of excise officers or, for the matter of that, in the power of police officers to smuggle an article into a house and bolster up a false case against the persons with whom they may be on terms of enmity. It is with

(1) [1919] 51 I. C. 465.

(2) [1917] 2 P. L. J. 657=41 I. C. 1002.

some object that the legislature has provided the safeguards, and when they are deliberately broken it is, in my opinion not for the accused to show that they have been prejudiced. The prejudice is, in my opinion, on the face of the record. They should not have entered the premises without search witnesses, the object being that it may not be in their power to smuggle articles into the house and bolster up a false case against them.

But I am not setting aside the conviction on this technical ground. I have got to examine whether the evidence on which the petitioners have been convicted is evidence which should have been relied upon by the Courts below. No doubt they have been guilty of very serious irregularities, as I have mentioned above, but that is not all. S. 20, Opium Act, provides that every person arrested, and thing seized, under S. 14 or S. 15, shall be forwarded without delay to the officer in charge of the nearest police station; and every person arrested and thing seized under S. 19 shall be forwarded without delay to the officer by whom the warrant was issued.

"Every officer to whom any person or thing is forwarded under this section shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing."

The provision as contained in S. 20, Opium Act, is peremptory and it gave no option to the Excise Sub-Inspector to keep investigation in his own hand, or to keep the things seized in his custody. The object of the section is plain. The object is that it may not be in his power to produce false evidence afterwards against the accused persons. But in this case he did not forward the opium seized to the nearest police station either without delay or at all. He did not produce the opium seized until he gave his evidence in Court. Nor is this all. He kept investigation in his own hand, took a recognition bond from Lachmi Narain, whom he arrested, and which recognition bond contained a full confession of the 'guilt' of Lachmi Narain. It has been found by the Court below that the thumb impression purporting to be the thumb impression of Lachmi Narain in the recognition bond in fact is not his thumb impression. The conclusion is that the document has been forged by somebody and as it has been produced by Tirbeni for the purpose of

securing the conviction of the petitioners, very grave suspicion must attach to the part played by Tirbeni in the matter of arrest of the petitioners.

And yet the petitioners have been convicted on an admission alleged to have been made by Lachmi Narain to Tirbeni. It seems to me that it is impossible to rely upon the evidence of Tirbeni, having regard to the fact that the learned Sessions Judge has himself recorded a finding that the document produced by Tirbeni is not the document to which Lachmi Narain affixed his thumb impression. That being so, in my opinion, the conviction must fail, both on facts and on law. I would therefore set aside the conviction and the sentence passed on the petitioners.

V.S./R.K. *Sentence set aside.*

A. I. R 1919 Patna 454

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Heramba Nath Bandopadhyaya—Defendant—Appellant.

v.

Surendra Nath Mittra and another—Plaintiffs—Respondents.

First Appeal No. 32 of 1918, Decided on 21st August 1919, from the decision of the Sub-Judge, Dhanbad, D/- 5th December 1917.

(a) Civil P. C. (5 of 1908), O. 3, R. 1 and O. 23, R. 3—Pleader's authority to compromise extends only to subject-matter of suit.

The authority of pleader to compromise a suit on behalf of his client does not extend to his effecting a compromise in respect of matter outside the scope of the suit. [P 461 C 1, 2]

(b) Civil P. C. (5 of 1908), O. 38, R. 5—Attachment before judgment continues after decree.

Where property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment, which continues in full force.

(c) Practice—Plea—Question of law arising out of facts alleged can be raised at any stage.

A question of law raised upon facts which are on the record, can be raised at any stage of the suit. [P 464 C 2]

(d) Civil P. C. (5 of 1908), S. 47—Suit by stranger in respect of property about which decree is passed and no execution taken out is not barred by S. 47.

Where a decree is obtained in respect of certain property, and a suit in respect of the same property is brought by a person who is not the representative of the judgment-debtor affected by the decree, before the decree is put in execution and there are no proceedings pending in which an application under S. 47 could be made, that section is no bar to the suit. [P 464 C 2]

(e) Evidence Act (1 of 1872), S. 35—Report by process server being official record is admissible.

The peon's return in execution proceedings, being an official record made by a public servant in the discharge of his official duty, is admissible in evidence. [P462 C 2]

S. M. Mullick and S. N. Bose — for Appellant.

P. C. Manuk and A. B. Mukerjee—for Respondents.

Judgment.—This is an appeal by Heramba Nath Bandopadhyaya, defendant 1 in the suit, from a decision of the Subordinate Judge of Dhanbad, dated 5th December 1917, in which he passed a decree in favour of the plaintiffs. The suit was instituted before the Subordinate Judge on 12th September 1916 by the plaintiffs as heirs and representatives of Charu Chandra Mittra, claiming certain declarations the effect of which was, put shortly, to confirm their title to a colliery, known as the Ranidih Colliery, free from all encumbrances and to prevent defendant 1 from selling the property under an attachment which he had obtained in the Calcutta High Court before judgment in a previous suit (No. 300 of 1911) brought by him against the then owners of the colliery, who are the remaining defendants in the present suit. The site of the colliery was originally acquired by one Sashi Bhusan Chattopadhyaya, the father of defendants 4 to 6 and husband of defendant 7, under a lease for a term of 999 years granted by Gopi Nath Chattopadhyaya on 8th October 1907. By a registered deed, dated 8th October 1908, the lessee transferred a 4 annas share in the lease to Naba Chandra Chattopadhyaya, defendant 2, and a 2 annas share to Kunja Behari Dutta, defendant 3, retaining the remaining 10 annas share himself. On 24th August 1908 Sashi Bhusan and his transferees, defendants 2 and 3, executed a mortgage of the entire 16 annas share in the lease of the colliery to Heramba Nath Bandopadhyaya, the appellant, to secure a cash advance of Rs. 30,000 at 15 per cent. interest per annum and a commission of 5 annas per ton on the amount of coal raised. On 5th September 1908 Sashi Bhusan died and his 10 annas share in the colliery passed to his four sons. One of the sons has since died.

His three surviving sons and his widow who, between them, now hold his 10 annas share, are respectively defendants 4 to 7. On 17th April 1909 Heramba

Nath Bandopadhyaya, the mortgagee, under a deed of management executed by defendants 2 to 7, was placed in charge of the colliery as managing agent under the name of Achard & Company of which firm he was the sole partner, and on the same day defendant 4 to 7 as heirs of Sashi Bhusan agreed to sell him their 10 annas share in the colliery in the benami name of his wife Anilabala Debi, receiving from him the sum of Rs. 5,000 as earnest money. On 10th September 1910 the defendant Heramba ceased to be the managing agent of the colliery and Charu Chandra Mittra, the predecessor-in-interest of the plaintiffs, was put in possession by the heirs of Sashi Bhusan who were then the 10 annas shareholders. It is the plaintiffs' case that on the same day an agreement in writing was entered into between the heirs of Sashi Bhusan (defendants 4 to 7) and Charu Chandra Mittra for the sale of the 10-annas share to the latter. This document was not produced in evidence, but some time later, viz. on 27th August 1913, these defendants in fact transferred their interest to Charu Chandra by a registered deed of that date, which recites that the assignment of the colliery to Charu Chandra was in accordance with a letter dated 10th September 1910 and acknowledges payment of part of the consideration money at various dates between 10th October 1910 and the date of the assignment.

On 23rd March 1911 the defendant Heramba instituted the suit numbered 300 of 1911 in the High Court of Calcutta against all the 16 annas shareholders of the colliery (present defendants 2 to 7) to recover a sum of Rs. 32,000 odd for advances made and expenses incurred in connexion with the management of the colliery during the time of his agency, and, two days later, on 25th March, applied to the Court in that suit O. 38, R. 5, for an attachment before judgment of the colliery, on the allegation that the defendants were about to dispose of it by sale to Charu Chandra Mittra and had no other means out of which the claim could be satisfied. On 27th March 1911 the High Court granted an order nisi under O. 38, R. 5, calling upon the defendants in that suit to show cause why they should not furnish security to satisfy any decree that might be passed against them and in default thereof, why the col-

liery should not be attached and, at the same time, the Court ordered an interim attachment to issue until such cause had been shown. On 19th May the defendants in that suit appeared to show cause. The defendants Naba Chandra Chattopadhyaya and Kunja Behari Dutta, the owners respectively of 4 annas and 2 annas shares in the colliery, gave an undertaking on that occasion not to alienate or in any way deal with their respective shares in the colliery during the pendency of the suit and the defendant Abani Bhusan Chattopadhyaya undertook not to deal further with his share during the pendency of the suit. His share, as one of the heirs of his father, was $2\frac{1}{2}$ annas. The remaining defendants gave no such undertaking. Thereupon the Court adjourned the further hearing of the order nisi until the hearing of the suit and ordered the interim attachment, previously granted, to be withdrawn so far as the said three defendants were concerned, but to continue so far as the others were concerned until the final disposal of the suit.

As a matter of fact, the writ of attachment under the order nisi of the 27th March had not, at that time been served, nor indeed did it issue from the office of the High Court at Calcutta until the 29th May although dated 27th March 1911. It was subsequently despatched to Purulia in the Manbhum District for service, and according to the peon's return, which has been referred to in evidence, it was served on the 14th June at the colliery. As it has been argued that the process served was not an attachment of the property at all but only an order restraining the defendants personally from alienating the property, it is desirable to set out the operative part in full. It reads as follows:

"To the defendants above named. Whereas by an order of Court made in this suit and dated 27th March 1911, it was amongst other things, ordered that an attachment should issue out of and under the seal of this Court prohibiting the defendants, until the further order of this Court, from alienating the colliery known as the 'Ranidih Colliery' in the district of Manbhum, by sale, gift or otherwise and also prohibiting all persons from receiving the same by purchase, gift or otherwise. It is ordered that the defendants be and they are hereby prohibited and restrained until the further order of this Court from alienating the said 'Ranidih Colliery' in the district of Manbhum by sale, gift or otherwise and that all persons be and they are hereby prohibited from receiving the same by purchase, gift or otherwise."

A preliminary decree in the aforesaid suit was passed in March 1913 and on the report of the Official Referee, was made final on 22nd November 1915 for a sum of Rs. 40,550 in favour of Heramba. In April 1911 a suit, numbered 345 of 1911, was instituted in the High Court of Calcutta in the name of Anilabala Debi, wife of Heramba, against Abani Bhusan Chattopadhyaya and others, the ten-annas shareholders, claiming the return of the sum of Rs. 5,000 paid as earnest money under the contract of sale of the 17th April 1909. On 21st June 1911 the defendants Naba Chandra and Kunja Behari instituted a suit, numbered 638 of 1911, in the High Court of Calcutta against Heramba, claiming damages for wrongful and malicious attachment of their shares in the colliery on the ground that the order made on the 19th May in Heramba's action (No. 360 of 1911) had directed the attachment as against them to be withdrawn and that he had, nevertheless, wrongfully attached their property. Some time in 1911 a further suit was instituted by Gopi Nath Bandopadhyaya and others, the landlords of the colliery, before the Subordinate Judge at Purulia against Abani Bhusan and others, the 16 annas lessees, and Heramba Nath Bandopadhyaya claiming arrears of rent and royalty. This suit was numbered 412 of 1911. On 2nd March 1912 Heramba Nath brought a suit before the Subordinate Judge at Purulia, which was numbered 106 of 1912, against Abani Bhusan and others, the present defendants 2 to 7, and Charu Chandra Mittra, the predecessor-in-interest of the present plaintiffs, to enforce the mortgage of 24th August 1908. On 29th July 1913 a compromise was arrived at between the parties in that suit and was filed in Court accompanied by a petition on behalf of all the parties in the suit except plaintiff 4, Srimatee Kalitara Debi, the widow of Shashi Bhusan (the present defendant 7).

The petition recited that all the parties had settled the suit in the terms of the compromise, but as Kalitara Debi had not filed a vakalatnama that day, it asked that the same might be filed within 7 days and a decree passed against her and the other defendants in the terms of the compromise when the vakalatnama should be filed. It appears that no vakalatnama had been signed by Kalitara

Debi on her own behalf, although she had signed one as guardian on behalf of her minor son Bidhu Bhusan who was also a defendant in that suit. This was subsequently procured and filed and on 30th August 1913 a decree was passed in the terms of the compromise. About the same time, viz., on 27th August, the defendants Abani Bhusan and others executed a deed of assignment of their 10-annas interest in the colliery to Charu Chandra Mittra and on 5th September 1913, defendants 2 and 3 assigned the remaining 6-annas share to Charu Chandra Mittra.

One of the main contentions in the case depends upon the construction of the compromise come to in Heramba's mortgage Suit No 106 of 1912. The plaintiffs contend that, on the true construction of the compromise agreement, Heramba undertook to enter satisfaction in his Suit No. 300 of 1911 in which he had attached the mortgaged property and to forgo all claims thereto upon payment of a sum of Rs. 1,20,000, the amount which by the terms of the compromise he was to receive in respect of his mortgage decree in Suit No. 106 of 1912. He on the other hand, contends that this part of the agreement was subject to a condition precedent to be performed by the defendants in the mortgage suit which had not in fact been fulfilled. The terms of the compromise were as follows:

"1. There is to be consent decree immediately in Suit No. 106 of 1912 (*Heramba Nath Bannerji v. Abani Bhusan Chatterji and others*) in the Court of the Subordinate Judge of Purulia in the following terms:

(a) There is to be a mortgage decree of Rupees 1,20,000 (one lakh and twenty thousand) including interest, commission and costs, and all the defendants except the minor defendant will be personally liable for the amount decreed with interest and costs in addition to the mortgage security.

(b) Interest is to run on the decretal amount at the rate of 15 (fifteen) per cent per annum with six-monthly rests from date hereof until actual payment.

(c) The plaintiff will not be entitled to execute the decree within six weeks from the date hereof but if the decretal amount with interest be not paid to him within the aforesaid time, he will be entitled to execute the decree with interest at the rate aforesaid.

(d) On the payment of the decretal amount Rs. 1,20,000 (one lakh and twenty thousand) with interest accruing due thereon by defendant 7, Charu Chandra Mittra, within 6 (six weeks) from the date hereof, the plaintiff will, if his claim under the decree is not in the meantime satisfied, transfer the decree herein in favour of

defendant 7, Charu Chandra Mittra or with his consent to any other person who may pay the said sum with interest as aforesaid, at the cost of the assignee and without recourse to the plaintiff, and thereupon the said defendant will be discharged from further acting as receiver and will not be liable in that event to account for this management.

(e) This is to be certified as being for the benefit of the minor defendant.

2. The following terms are also agreed by and between the parties.

(a) Heramba Nath Bannerji will, on payment of the decretal amount, i. e., Rs. 1,20,000 (one lakh and twenty thousand) with interest in the said Suit No. 106 of 1912 to him within six weeks from the date hereof, cause at the cost of the defendants in the said suit, satisfaction to be entered in Suit No. 300 of 1911 (*Heramba Nath Bannerji v. Naba Chandra Chatterji*) and Suit No. 345 of 1911 (*Anila Bala Debi v. Abani Bhusan Chatterji*).

(b) Naba Chandra Chatterji and Kunja Behary Dutta will withdraw the suit instituted by them in the Calcutta High Court against Heramba Nath Bannerji for damages for malicious attachment now pending in the said Court within six weeks from the date hereof.

(c) Charu Chandra Mittra indemnifies Heramba Nath Bannerji against the claim of the plaintiffs Gopi Nath Bannerji and others in Suit No. 412 of 1911 of this Court in respect of all subsequent rents and royalty accruing due till the payment of the decretal amount.

(d) All the defendants in the said Suit No. 106 of 1912 undertake that they and each of them will file in Court express authority in favour of their respective pleaders to consent to these terms.

(e). In case the said defendant fail to proceed and file such authority as in sub-Cl. (d), Cl. (2), hereof within three weeks from the date hereof, the terms contained in sub Cls. (a) to (c), Cl. (2) hereof, will not come into operation."

On 12th September 1913 the sum of Rs 1,22,000, the decretal amount with interest and costs then due under the compromise mortgage decree, was deposited in Court by Charu Chandra Mitra in favour of the appellant Heramba, the plaintiff in that suit, and on 26th September 1913 this sum was withdrawn on behalf of the appellant.

It will be observed on referring to Cl. 2 of the compromise agreement above set out that in arriving at a settlement of that suit the parties endeavoured to settle also the several other actions which were then pending between them. The appellant however contends that the terms contained in Cl. 2 of the compromise agreement never became operative because sub-Cl. (d), Cl. 2, was not complied with and by sub-Cl. (e) it was provided that unless the express authority mentioned in sub-Cl. (d), should be filed in Court within three weeks the terms of

Cl. 2 of the agreement should not come into operation. In these circumstances, the appellant contends that he is entitled to proceed to execute his decree in suit No 300 of 1911 and to sell the attached property in satisfaction of his decree. Hence the respondents have brought the present suit claiming the declaration already referred to. The respondents further contend that the writ of attachment issued on behalf of the appellant in that suit was not properly served and if process was served, it was not in fact a writ of attachment at all binding on the property, but merely an order of the Court upon the owners of the property enjoining them from parting with their interest, and the appellant's right, if any, lies in damages against the persons enjoined and gives him no lien upon the property. It appears that an application was made on behalf of the judgment-debtors in Suit No. 300 of 1911 to have satisfaction entered in that suit on the ground of the agreement contained in Cl. 2 of the compromise in the mortgage suit. This application was made in August 1914 before the High Court at Calcutta and was refused, the Court being of opinion that the terms contained in sub-Cls. (d) and (e), Cl. 2 had not been complied with and further that the application was time barred. In our opinion that decision does not bar the present suit. The main issues raised before the Subordinate Judge in the present suit were whether the appellant was bound to enter satisfaction in the High Court Suit No. 300 of 1911 in pursuance of the terms of the compromise in Suit No. 106 of 1912, and whether the terms of the compromise had been complied with by the defendants in that suit so as to bind the parties by the terms of Cl. 2 and secondly, whether the attachment of the property in suit was properly effected in Suit No. 300 of 1911.

The learned Subordinate Judge, as far as we are able to follow his reasoning, came to the conclusion that the compromise agreement was not expressed in clear and unambiguous terms and that therefore it was permissible under the second proviso of S. 92, Evidence Act, to admit oral evidence as to the real meaning and intention of the parties expressed in the written agreement. He accordingly relied upon a statement of Charu Chandra's manager, Ram Prasad Mittra, who was at Purulia when the compro-

mise was come to. This witness said that he did not know the details of the compromise but he knew that on payment being made of the decretal amount all disputes between the parties would be settled. The Judge accordingly found that all that was necessary to bring into operation the terms of Cl. 2 of the agreement was that the decretal amount should be paid and that the conditions in Cl. 2 (e) ceased to be binding on payment of the decretal amount. It seems clear that the learned Subordinate Judge entirely misapprehended the scope and effect of S. 92, Evidence Act. Oral evidence for the purpose of contradicting written documents or ascertaining the intention of the parties is not admissible: see *Balkishen Das v. W. F. Legge* (1). It is true that by the sixth proviso of the section evidence is admissible of facts which show in what manner the language of a document is related to existing facts, but the evidence relied on by the learned Subordinate Judge was not given with the object contemplated in the sixth proviso. Its object clearly was to vary the terms of the written contract by showing an intention, not expressed therein, to treat the condition contained in sub-Cls. (d) and (e), Cl. 2, as inoperative as soon as the decretal amount mentioned in Cl. 1 should have been paid. Although it is true that an ambiguous agreement affords no protection to the person seeking to rely upon it in order to avoid an obligation he would otherwise be under, it would appear that the learned Subordinate Judge did not consider the element of ambiguity from this point of view. Had he done so it is not easy to see, when one considers the nature of the ambiguity which he conceived to exist, how this would have assisted the present plaintiffs. It is unnecessary however in our opinion, to pursue this matter as the document does not appear to us upon a true construction to contain any ambiguity at all.

It consists of two clauses, the first of which provides that there shall be a consent decree upon certain terms enumerated in sub-Cls. (a) to (e). These sub-clauses clearly provide that there shall be a mortgage decree for a named sum including interest, commission and costs, for which all the defendants except the minor were to be personally liable.

(1) [1900] 22 All. 149=22 I. A. 58 (P. C.).

Interest from the date of the decree is to run at 15 per cent. per annum, the decree is not to be executed for six weeks. During that period Charu Chandra Mittra had the option, if the claim was not in the meantime satisfied (presumably by the other defendants in the suit), of paying off the decretal amount and receiving an assignment of the decree from the decree-holder. The second clause related to matters outside the scope of the suit and could not properly form a part of the decree in that suit, but might be regarded as part of the terms of compromise and as such would be binding upon the parties when recorded. It related to claims in the various other suits pending at that time between the parties or some of them and provided that each should forgo their respective claims against the others, and as presumably the pleaders representing the parties in the mortgage suit would not necessarily be authorized in that suit to compromise claims between the respective parties in other suits, it provided that the defendants should file in Court express authority in favour of their respective pleaders to consent to these terms. This was no doubt stipulated in order to put an end once and for all to the chance of any dispute arising thereafter as to the authority of the respective pleaders to bind their clients, and by sub Cl. (e) it was expressly provided that, unless the authority should be filed within three weeks from the date of the compromise, the terms of Cl. 2 should not come into operation.

It is difficult to see in what respect the agreement can be said to be ambiguous. The mortgage suit was to be compromised on the terms mentioned in Cl. 1, whether or not those mentioned in Cl. 2 should come into operation, and those mentioned in Cl. 2, were only intended to come into operation, if and when the defendants should expressly authorize them in the manner therein indicated. If the conditions imposed by sub-Cls. (d) and (e), Cl. 2, were not performed, then the mutual obligations imposed by the earlier part of the clause ceased to be operative. In our opinion it is difficult to read this document in any other manner. The learned Judge was impressed by the fact that the decretal amount of Rs. 1,20,000 was more than the total amount claimed in the mortgage suit which was Rs. 88,588

and that therefore the decretal amount was probably arrived at by including a portion of the appellant's claim in Suit No. 300 of 1911. We have great doubts whether he was entitled to consider this question at all, but, in any event, it leaves out of consideration the fact that the sum due at the date of the decree for principal, interest and commission under the mortgage of 21th August 1908 amounted to about Rs. 1, 4,000. This calculation, it is true, is based upon an increased rate of interest after the first year as provided by the mortgage bond, and it is contended that the increased rate was not legally recoverable. It does not appear however, that any objection upon this score was raised in the mortgage suit and it is in our opinion, not legitimate to speculate as to how the decretal amount was arrived at. It is further contended that as the Court recorded the compromise on 30th August 1913, that is, more than 3 weeks after the date of the compromise itself, it was not competent to the appellant to contend that the provisions of sub-Cls. (d) and (e), Cl. 2, had not been complied with.

It was argued that before recording such a compromise the Court was bound to ascertain for itself that it was valid and binding and if in fact the condition had not been at that time fulfilled, Cl. 2 of the compromise would not have been recorded and therefore any failure to comply with that condition must be taken to have been waived by the parties. The learned Judge considered that as the compromise had been recorded by the Court under the provisions of O. 23, R. 3, Civil P. C. it must be regarded as a lawful agreement and that if the appellant's contention were accepted as to the effect of Cl. 2, there was no agreement at all so far as that clause was concerned and that the Court would not record mere negotiations not binding upon the parties. We are unable to accede to this argument. The agreement was in fact filed on 29th July and when the decree was passed on 30th August, there was nothing to show that the Court made any enquiry as to whether the conditions had been fulfilled or that this matter was even mentioned. The Court might well have assumed in the absence of any mention of the matter that the condition had been fulfilled and in any event it was no part of the Court's duty to ascertain whether the parties had

complied with the condition. It might involve a long and intricate enquiry which the Court was, in our opinion, not bound to enter into. The agreement on the face of it, was lawful and what the ultimate effect of it might be was not a matter which it was the duty of the Court at that time to enquire into.

It further remains to consider whether the condition imposed by Cl. 2 (d) was in fact complied with. This question depends mainly upon the effect of certain vakalatnamas which have been produced in evidence and on the oral testimony of Ananga Mohan Bhattacharji, a pleader engaged on behalf of Kalitara Debi and her minor son Bidhu Bhusan in the mortgage suit at Purulia in which the compromise was come to. He was called as a witness on behalf of the plaintiffs in the present suit. From his evidence it appears that the draft compromise was written out in the Bar Library at Purulia on the afternoon of 29th July after discussion between the pleaders and others representing the parties. They then looked into the record to ascertain from the vakalatnama filed how far each of the parties had given authority to their pleaders to compromise the suit. It appeared that no vakalatnama had been filed by Srimati Kalitara Debi defendant 4 in that suit, on her own behalf, although she did sign one on behalf of her minor son Bidu Bhusan who was also a defendant. The petition asking for the compromise decree (Ex. 6), therefore, prayed that she might be allowed 7 days to file a vakalatnama. This was in fact, not filed until 30th August, the time for doing so having been extended by order of the Judge. It was urged on behalf of the respondents that as this petition only asks for 7 days for filing the vakalatnama and as the compromise in Cl. 2 allowed 3 weeks for filing express authority, it ought to be assumed that all the parties were agreed that the express authority required had in fact been filed by all the parties except by Kalitara Debi and as they were all anxious to get the matter through, the time was reduced to 7 days. We are quite unable to draw any such inference from the terms of this petition. As Kalitara Debi had filed no vakalatnama at all it was quite obvious that there was nobody who could compromise the suit on her behalf much less agree to terms relating to matters outside the suit and

therefore it was necessary in any event that some authority on her behalf should be provided and this was undoubtedly the object of asking that the decree should only be passed after her authority had been obtained. The 7 days would expire on 5th August but the time was subsequently extended by order, as appears from the order sheet (Ex. 11), to 30th August. On that day Kalitara Devi's vakalatnama was in fact filed. It also purports to be executed on behalf of Abani Bhusan, Indu Bhusan and Bidhu Bhusan, defendants 1 to 3 in the mortgage suit. It is marked Ex. 5 in the case. It authorizes the pleaders named therein to file any petition whatever or solenama or deed of settlement, and it is probably wide enough to cover the special terms mentioned in Cl. 2 of the compromise. It further appears that on 29th July a vakalatnama (Ex. 4) had been executed on behalf of the same defendants 1 to 3 and Naba Chandra, defendant 5, and was filed the same day. The latter had also previously filed a vakalatnama jointly with Kunja Behari on 20th April 1912 : Ex. 1. If in fact, the existing vakalatnama executed by the parties in favour of their pleaders were regarded as a sufficient compliance with Cl. 2 (d) of the compromise, it remains to be explained why any of them should subsequently have filed others.

Exhibit 4 authorizes the pleaders to file a compromise deed in connexion with the suit and "to do any other act in connexion with this suit on our behalf." Assuming that Exs. 4 and 5 may be interpreted as giving the authority required by Cl. 2 (d), there was nevertheless no such express authority executed as required on behalf of either Kunja Behari or Charu Chandra, the other two defendants in the suit, after the compromise was entered into, nor was Ex. 5 filed within the 3 weeks stipulated. It is true that a vakalatnama on behalf of Kunja Behari had been filed in the suit on 20th April 1912, and a similar document was filed on behalf of Charu Chandra on 26th June 1913. These are in the usual form authorizing their pleaders to act for them and to compromise the suit and can in no sense be regarded as express authority to consent to the terms of Cl. 2 of the compromise agreement, which are matters outside the scope of the mortgage suit altogether. Counsel

no doubt has a general authority to compromise a suit on behalf of the client engaging him, but this does not extend to collateral matters outside the scope of the action: see *Nando Lal Bose v. Nistarini Dassi* (2). The authority of a pleader is certainly no greater, and it has been held that he has not even authority to compromise the matters in dispute in the suit itself unless specially empowered to do so: see *Mt. Sirdar Begum v. Izzutoolnissa* (3). This appears to us obviously to have been the reason why Cl. 2 of the compromise contained the stipulations as to filing the express authority therein mentioned and as there was an express condition that if such authority were not filed within 3 weeks the terms of Cl. 2 should not come into operation, there was in our opinion no compliance with this provision.

Even if the time be extended up to the date of the decree, viz., 30th August, there is not even then any express authority filed by Charu Chandra or Kunja Behari nor have they since complied with the stipulation. It was urged by the appellant as significant that the assignment executed by Abani Bhusan and others, the 10 annas share-holders, to Charu Chandra on 27th August 1913 transferred to the purchaser the vendors' claim which they had put forward by way of set off or counterclaim against Heramba in Suit No. 300 of 1911, which is one of those mentioned in the compromise. This they contended, points to the conclusion that the parties to that instrument regarded the suit as still subsisting at that date. We do not think much importance can be attached to this. It is however much more significant that none of the parties made any attempt to enter satisfaction in Suit No. 300 of 1911 until long after the time stipulated, and no attempt was made by Naba Chandra and Kunja Behari to withdraw their suit for malicious attachment until 10th July 1917, which was 10 months after the present suit was instituted. In our opinion there was no compliance with the provisions of sub-Cl. (d), Cl. 2, and under Cl. (e), the earlier terms of that clause never became operative.

The learned Subordinate Judge considered that the decree having once been passed in accordance with the terms of the compromise so far as it related to the suit and the compromise having been recorded there was an end of the matter, and a failure to comply with the special stipulations was of no consequence. It is not easy to follow him through this part of his argument. Assuming that the terms of Cl. 2 had the same binding force as a decree, it is clear that they were subject to a condition and if the condition was not complied with, those terms cannot become operative. The learned Judge also found that the parties varied the terms of the agreement by excluding sub-Cls. (d) and (e), Cl. 2. We are unable to find any evidence of such an agreement to vary the terms. Had such an agreement been come to before the decree was passed, it may safely be assumed that those clauses would have been deleted from the compromise and would not have been recorded. It was next urged that Heramba by taking the money out of Court waived his right to object that the conditions imposed by Cl. 2 had not been fulfilled. This argument has, in our opinion, no force. Cl. 2 was in its operation independent of Cl. 1. Cl. 1 was to operate in any event, the second only in the event of the express authority being filed. By Cl. 1 Charu Chandra Mittra had the option of paying the decretal amount into Court, in which event he would be entitled to an assignment of the decree in his favour. There was no compulsion upon him to do so but by so doing he gained certain advantages. He avoided a sale of the property in which he was interested and stepped into the shoes of the mortgagee. In our opinion, Cl. 1 operated in any event, and was in no way dependent upon Cl. 2 becoming operative. Heramba therefore by taking out the money cannot be taken to have waived his right to the performance of the conditions attached to Cl. 2.

It remains to consider whether the attachment was properly effected and if so, what the effect of such attachment was as against the claims of the plaintiffs. The Subordinate Judge found that it had not been proved that the writ of attachment had been served on the colliery. He arrived at this conclusion by refusing to accept the evidence of Ashutosh

(2) [1900] 27 Cal. 428.

(3) [1870] 2 N. W. P. H. C. R. 149

Munshi, a servant of the appellant who accompanied the serving peon when the service was alleged to have taken place. The peon himself at the date of the trial was away on leave and although a summons was issued for his attendance as a witness, he could not be found and hence he was not called at the trial. The peon's return of the service of process of attachment with his affidavit attached testifying to the service and signed by him was put in evidence subject to objection. His signature was proved by the Naib Nazir of the Court of the District Judge of Purulia. A certified copy of the writ of attachment, with an endorsement by the Nazir that it appeared from the peon's return that it had been duly served, was also put in and proved. A copy of the plaint in Suit No. 638 of 1911 brought by Naba Chandra and Kunja Behari against the appellant claiming damages for wrongful attachment was also put in evidence and not objected to. Para. 9 of that document states in terms that an agent of the appellant appeared at the colliery on 14th June 1911 with poens of the Purulia Civil Court and others and caused the attachment to be made, and that it was conducted by the peons by beat of drum and that notices were pasted at the colliery and also delivered to the agent there. The writ of attachment was one of the notices therein referred to. It seems to us that evidence of the service of the writ of attachment is overwhelming.

The reasons given by the learned Judge for not accepting the evidence of the witness Ashutosh Munshi, whose name appears as one of the identifiers in the peon's report, do not commend themselves to us and we accept his evidence as that of a witness of truth. Apart from his evidence there is also the admission in the plaint in Suit No. 638 of 1911 just referred to. This is an admission by two of the plaintiffs' predecessors-in-title to the property, the subject-matter of the suit, made at a time when they had an interest in that property. Under S. 18, Evidence Act, such statements are admissions from which an inference adverse to the plaintiffs in the suit may be drawn. This document corroborates absolutely the other evidence in the case. In our opinion, it makes no difference that the attachment was withdrawn by the order of the High Court of Calcutta, so far as

the shares of the plaintiffs in that suit are concerned. It is an admission that their share was attached. That share as well as the rest is the subject-matter of the present suit and there was only one attachment of the whole property. We further think that the peon's return, being an official record made by a public servant in the discharge of his official duty, was clearly admissible in evidence, the peon's signature having been duly proved and the document produced from the proper custody. The form of return is that prescribed by the General Rules and Circular Orders, Vol. 2, Civil, Appendix B, No. 5, and the affidavit is made under the provisions of O. 5, R. 18, read with O. 48, R. 2, Civil P. C. There can be no reasonable doubt, in our opinion, that the attachment was duly served. The evidence of Ram Prasad Mitra, who was in Calcutta at the time and swears that he heard nothing about it, may or may not be true. We rather suspect the latter but in any case it is not of such a nature as to have any weight against the positive evidence of Ashutosh Munshi, corroborated as it is by the documentary evidence produced.

It was next urged on behalf of the respondents that the process served was not an attachment at all, but merely a personal order directing the defendants in that suit not to part with their shares in the property. The terms of that document have already been quoted in an earlier part of this judgment. The respondents in support of this contention relied upon the case of *Mahendra Narain Saha v. Gurudas Bairagi* (4). That was a case where an order was made by the Subordinate Judge upon the defendants to show cause why an attachment of their property should not issue before judgment, and pending the hearing of the rule they were directed not to part with their property. The form of order was not that prescribed by O. 38, R. 5, Civil P. C., and no order attaching the property was in fact made. When the defendants appeared to show cause, the Court was satisfied that no reason for attaching the property had been made out and dismissed the application. From this there was an appeal to the High Court. A preliminary point was taken that no appeal lay from such an order. The question was whether the last order

(4) [1916] 33 I. C. 689.

dismissing the application was one made under O. 33, R. 6. If so, an appeal lay but not otherwise. The High Court decided that it was not an order made under R. 6. In fact no attachment had been ordered under R. 5 and the procedure laid down in R. 6 had not come into operation. What was done was in effect a dismissal of an application under R. 5 from which there was no appeal, and the Court dismissed the appeal on the preliminary objection. In the case now under consideration an order under R. 5 was clearly passed on 27th March 1911 (Ex. H) calling upon the defendants to show cause why security should not be given and ordering attachment to issue until such cause should be shown. The writ, which was eventually served (Ex. E), recites that an order of attachment had been made and prohibits the defendants from parting with the property until the further order of the Court. The further order of the Court on 19th May 1911 ordered the attachment to be removed, so far as the interest of the three defendants who gave an undertaking was concerned, and to continue so far as the interest of the other defendants was concerned until the final disposal of the suit. The latter order would appear to have been properly made under R. 6, O. 38, and kept the attachment in so far as it was not withdrawn. In the case relied upon no order of attachment was ever made and it affords no authority for the respondents' present contention.

It was further contended however that the attachment ceased when the decree was passed, the suit being then finally disposed of within the terms of the order. It would be a strange result if the benefit of this procedure should cease to operate at the moment when the plaintiff obtained a decree in his favour so as to deprive him of the fruits of victory, and it seems clear from the terms of Rr. 9 and 11, O. 38, that such was not the intention of the legislature. The former relates to the circumstances under which the Court shall order the attachment to be withdrawn, viz., when security is provided or the suit dismissed. The latter provides that where the property is under attachment by virtue of the provisions of that order and decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution to apply for re-attachment of the

property. In our opinion the attachment continued in full force after the decree was passed in favour of the plaintiff in Suit No. 300 of 1911: see *Ganu Singh v. Jangi Lal* (5).

It was next contended that the writ of attachment was bad because it was not in the form prescribed in App. F, No. 5, Civil P. C. The form there set out is a composite form addressed to the bailiff commanding him to call upon the defendants to give security or show cause and to attach and keep in safe custody the property until further order. These forms are subject to variation (see O. 48, R. 3). Form No. 5, App. F, would appear to be adapted to the case of moveable property as the bailiff is directed to keep the property under safe and secure custody. There is no special form adapted to the case of immovable property, but in Appx. E which is applicable to attachments in execution, a special form, No. 24, is provided to meet the case of immovable property and is more like the form employed in the present case. It appears from the affidavit of Nilmony Roy and from the evidence of that witness given at the trial that the order of 27th March 1911 calling upon the defendants in Suit No. 300 of 1911 to show cause was duly served and the defendants in fact appeared to show cause before the writ of attachment was served. There was therefore no necessity to serve again a similar notice with the writ of attachment, and the form prescribed in Appx. F was not in the circumstances applicable. Moreover it must be remembered that that suit was brought in the Calcutta High Court in the exercise of its original jurisdiction, and the forms prescribed under its own rules of procedure under the powers saved by S. 129, Civil P. C. differ in many respects from those in the appendices to the Code. We think that, until the contrary is shown, we must presume that the writ which bears the seal of the Calcutta High Court was a valid writ authorized by its own procedure.

A further point was taken on behalf of the respondents that as by the compromise the appellant agreed to transfer his rights under the mortgage decree to Charu Chandra on payment of the decretal amount, he surrendered his right of sale under the attachment to the latter. The

attachment was no doubt subject to existing liens including Heramba's own rights as mortgagee, but subject to this the equity of redemption could be attached and the transfer of the mortgage decree, although it may have given the transferee a prior claim on the proceeds to the extent of the amount of the mortgage decree, cannot affect the right of sale under the attachment. What the respective rights of the parties may be once the property is sold we are not concerned with in the present suit, which merely prays for a declaration that the property belongs to the plaintiffs free of all encumbrances and that the appellant is not entitled to sell it in execution of his decree in Suit No. 300 of 1911.

The next point urged by the respondents was that by a letter of 10th September 1910, that is, before the attachment was effected, defendants 4 to 7 had already entered into a contract with Charu Chandra for the sale to him of their share in the colliery, and that of the consideration money Rs. 51 was paid on 10th October 1910 and Rs. 200 on 18th May 1911, although the assignment was not actually executed until 27th August 1913, the attachment having taken place on 14th June 1911. It is contended that the respondents had on the latter date an interest in the property which could be enforced against the owners and that they were entitled to priority over the rights of the attaching creditor. It is clear by the terms of S. 54, T. P. Act, that a contract for the sale of immovable property creates no interest in or charge upon the property in this country. It was pointed out however that no interest in or charge on the property is created even by an attachment and that Charu Chandra could have enforced a suit for specific performance of the contract contained in the letter of 10th September 1910. He therefore had a right existing prior to the attachment within the meaning of O. 38, R. 10. The case of *Madan Mohan v. Rebati Mohan* (6) was relied upon in support of this contention. There is no doubt much force in this argument, but there is no evidence to show what the terms of the letter of 10th September 1910 were or how far it gave any right to Charu Chandra which could have been enforced by a suit for specific performance. The point was not taken before

the trial Judge and had it been taken, strict proof of the contract, if any, contained in the letter of 10th September would have been required. This letter was not produced and it is impossible to say how far it gave any right to Charu Chandra to insist upon an assignment of the property. A mere reference to such a letter in the deed of assignment of 27th August 1913 is no evidence against the appellant, nor does the deed of assignment itself show what its terms were. No reason is given for its nonproduction and its contents must remain a matter of pure surmise. We cannot assume from evidence of this nature, especially as the question was not raised or discussed in the trial Court, that Charu Chandra acquired any enforceable rights under this letter at all. In these circumstances we are bound to hold that the attachment was not affected in any way by this matter.

A further question was raised on behalf of the appellant, namely, that S. 47, Civil P. C., was a bar to the present suit. This point was not taken in the written statement. The learned Judge considered that as O. 8, R. 2, had not been complied with, the appellant was not entitled to raise the point. He further considered that as there had been no valid attachment of the property at all in Suit No. 300 of 1911, the plaintiffs in the present suit were not the representatives-in-interest of the judgement-debtors in that suit and that the section did not apply. This part of his judgment would appear to be open to several objections. The question is purely one of law and the facts upon which it has been raised are on the record. It is therefore open to the plaintiff to raise it at any stage of the suit. We do not think however that S. 47 is a bar to the present suit. The suit was brought before the decree was put in execution and there were no proceedings then pending in which an application under S. 47 could be made. The facts relied upon by the plaintiffs in their suit affect not the execution of the decree so much as the decree itself, which was passed on 22nd November 1915 and which it is claimed should not have been passed at all in the face of the compromise of 29th July 1913. Moreover, as the attachment of the shares of defendants 2, 3 and 4 was set aside by the order of 19th March 1911, that property is not now the

subject of any attachment and the plaintiffs are not the representatives of those judgment-debtors by reason of having acquired their share in the colliery which no longer forms a part of the attached property. Had the appellant admitted this, possibly there would have been no necessity to claim a declaration so far as this portion of the property is concerned, but no such admission was made and it was contended that the whole property had been attached.

In the result we think that the decree of the Subordinate Judge should be varied and that a decree should be entered in lieu thereof declaring that the plaintiffs are entitled to the $8\frac{1}{2}$ annas share in the Ranidih Colliery, which they purchased from defendants 2 to 4, free from the attachment. The appellant has succeeded in part and is entitled to proportionate costs of this appeal. The respondents will recover their proportionate part of costs of the lower Court.

V.S./R.K.

Decree varied.

A. I. R. 1919 Patna 465

MULLICK AND JWALA PRASAD, JJ.

Lachmi Narain Agarwala—Petitioner.

v.

Kali Prosonno Bhattacharji and others
—Opposite Parties.

Civil Revn. No. 151 of 1919, Decided on 16th June 1919, from decision of Dist. Judge, Manbhum.

(a) Civil P. C. (1908), O. 21, R. 89—Judgment-debtor parting with his interest in property sold in execution to a third person can apply to have the sale set aside—Purchaser from judgment-debtor has no locus standi to apply under R. 89.

The fact that a judgment-debtor has parted with his interest to a third party in property attached and sold in execution of a decree is no bar to his making an application under O. 21, R. 89, to have the sale set aside.

A purchaser by means of a private deed of the property of a judgment-debtor attached and sold in execution of decree has no locus standi to make an application under O. 21, R. 89.

[P 466 C 1]

(b) Civil P. C. (1908), O. 21, R. 89—Deposit made under R. 89—Sale must be set aside.

When a deposit is made under R. 89, O. 21, it is the duty of the Court to proceed to set aside the sale.

[P 466 C 2, P 467 C 1]

(c) Civil P. C. (1908), O. 21, R. 89—Court refusing to accept deposit by judgment-debtor—High Court has power to interfere.

Where a Court declines to accept the deposit from the judgment-debtor, its action amounts to a refusal to exercise jurisdiction and the High Court can interfere under S. 115.

[P 466 C 2]

Sushil Madhab Mullick and Abhani Bhushan Mukherji—for Petitioner.

Jayaswal and Haribhusan Mukherji—for Opposite Parties.

Mullick, J.—This matter arises out of the sale of two plots of land in the town of Dhanbad in execution of a rent decree. After the sale an application was made under O. 21, R. 89, Civil P. C., by the judgment-debtor to set aside the sale. The Subordinate Judge, without hearing the auction-purchaser and the decree-holder, accepted the deposit and granted the prayer of the judgment-debtor. The auction-purchaser then took the matter up in appeal to the District Judge, and it being discovered that the judgment-debtor was dead, he brought the heirs of the judgment-debtor upon the record of the appeal. The order passed by the District Judge after hearing the parties was that the application should be reheard by the Subordinate Judge in the presence of the decree-holder, the auction-purchaser and all parties affected. The case went back to the Subordinate Judge. The judgment-debtor's heirs were apparently unwilling to prosecute the matter, or at any rate they did not take any steps to adduce evidence: but a private purchaser, the petitioner before us, subsequent to the sale came forward and put in a petition before the Subordinate Judge asking that he should be allowed to prosecute the application on behalf of the judgment-debtor. That petition was made on 7th January 1919, and the order made by the Subordinate Judge thereupon was that the application would be taken into consideration at the time of the hearing of the case. It appears that thereafter the petitioner was allowed to deposit the various process fees necessary for service of notice upon the parties to the case and also to get summonses issued upon the witnesses for this purpose. It also appears that at the hearing he was allowed to file a document in support of the judgment-debtor's prayer and that his vakil or pleader was heard when the case was finally argued.

The result was that the Munsif, the case having been in the meantime transferred to his Court by the Subordinate Judge, dismissed the application, holding that under O. 21, R. 89, it was not competent to the judgment-debtor to make a deposit after he had already parted with his interest in the property by sale to a

third party. The petitioner then took the matter up in appeal to the District Judge, who affirmed the finding of law of the Court below and added a further ground for dismissing the appeal, namely, that the petitioner was entitled neither to support the application of the judgment-debtor nor to prosecute the appeal, inasmuch as he was not the legal representative of the deceased. The present application has been made to us under S. 115, Civil P. C., against the order of the District Judge. Now upon the point of law as to whether O. 21, R. 89, permits a judgment-debtor to make an application for the purpose of setting aside a sale, even though at the time of the application he has parted with his interest in the property, the decision of this Court in the case of *Mt. Dhanwanti Kuer v. Sheo Shankar Lall* (1) is conclusive. So far as this Court is concerned it is settled for the present that the judgment-debtor in such a case is still competent to avail himself of the provisions enabling him to make a deposit. It is contended however that as the petitioner had no locus standi in the Court of the Munsif, he ought not to have been allowed to appeal, and as the appeal was incompetent the order of the District Judge therein was a nullity, and therefore there is no order with which we can interfere in revision.

Now in my opinion the petitioner was not a person whom the Munsif should have heard. He as the assignee after the sale had no interest in the property: but that circumstance did not debar the Munsif from disposing of the application according to law. The Munsif had before him the judgment-debtor's representatives who had been brought upon the record in the appeal; and indeed the law says that when a deposit is made, the Court shall proceed to set aside the sale. In this case therefore the proper course was to refuse to hear the petitioner, but to set aside the sale. As for the contention that the order of the appellate Court was a nullity, I do not think there is any substance in it whatsoever. The Munsif, though wrongly, did in fact accept the petitioner as a party; the mere omission to enter the petitioner in the heading of the judgment or in the record as a party does not make any difference. The petitioner was allowed to

adduce evidence, to pay process-fees, to address the Court, and to carry on the litigation on behalf of the judgment-debtor. He must therefore be held to have been in fact joined as a party in the proceedings before the Munsif. That being so he had a right of appeal if he was affected by the order made by the Court. It was open, no doubt, to the District Judge to decide in the appeal that he ought not to have been allowed to appear before the Munsif, but it cannot be said that the appeal was incompetent by the petitioner because the petitioner was an entire stranger to the proceedings. It was open, no doubt, to the District Judge to hold as he has done, that the petitioner was not a person entitled to relief, but it was incumbent upon him nevertheless to decide the other point in the case, namely, whether or not the deposit had been legally made by the judgment-debtor. His order therefore cannot be treated as a nullity and the petitioner is right in seeking to have it set aside. But even if it be held that the order is a nullity, the Munsif's order stands in the petitioner's way and is liable to revision by us.

Both Courts, in my opinion, refused to exercise jurisdiction in declining to accept the deposit from the judgment-debtor. The order of both will be set aside under S. 115, Civil P. C. It is said that the heirs of the judgment-debtor are no longer willing to have the sale set aside. There is no evidence of this. The mere omission on the part of the heirs to prosecute the application made by their predecessor before the Munsif is not conclusive upon the point. Even if the allegations were true and they had after the sale to the petitioner sought to defraud him by siding with the auction-purchaser and intimated their unwillingness to have the sale set aside the Court could not have given effect to that fraudulent act. We have however nothing to show that the heirs are in fact unwilling, and therefore the proper order that ought to be made is that the deposit if it complies with the provisions of the law, be accepted and the sale set aside. The application will be allowed with costs. Hearing fee two gold mohurs.

Jwala Prasad, J.—The deposit in this case was properly made by the judgment-debtor under O. 21, R. 89. The judgment-debtor expressly stated his intention to have the sale set aside. The sale

(1) [1919] 4 P. L. J. 340=51 I. C. 873.

was accordingly set aside on 16th August 1918. The judgment-debtor in the subsequent proceedings died. The legal representatives of the judgment-debtor are on the record and they do not object to the application having been made by the judgment-debtor to have the sale set aside. The mere silence of the heirs of the judgment-debtor cannot be construed as a withdrawal of the application made on behalf of deceased judgment-debtor. There does not appear therefore to be any alternative, but to set aside the sale under R. 92, O. 21. I agree therefore with the order made in the case by my learned brother and I also agree that the petitioner, the purchaser of the property by means of a private deed from the judgment-debtor, had no locus standi to make an application under R. 89, O. 21, but that does not affect the position in the case that the sale must be set aside under the said order.

V.S./R.K. *Application allowed.*

A. I. R. 1919 Patna 467

ROE AND COUTTS, JJ.

Bajinath Ram and another—Appellants.

v.

Mt. Chand Kumari—Respondent.

Appeals Nos. 297 of 1917 and 178 of 1918, Decided on 20th December 1918, from orders of Sub-Judge, Deoghar.

Civil P. C. (5 of 1908), O. 22, R. 4—Decree obtained against ghatwal in personal capacity—Death of judgment-debtor—Widow is legal representative of ghatwal.

During the pendency of execution proceedings in respect of a decree obtained against a ghatwal in his personal capacity the judgment-debtor died and the decree-holder applied to bring his widow on the record as his legal representative. The Court rejected the application on the ground that the ghatwal's estate was not liable for his personal debts and therefore, his widow as his successor to the office of ghatwal could not be brought on the record:

Held: that the widow having succeeded to the ghatwal's personal property as his heir, irrespective of any question of her succession to the office of ghatwal, she should be brought upon the record as the representative-in-interest of the deceased judgment-debtor, it being understood that any execution that may be taken against her with regard to the personal debts of the deceased would be limited to property which came into her possession in her personal capacity and that no assets that came into her possession by her succession to the rights of the ghatwal would be liable to be pursued. [P 467 C 2]

Naresh Chandra Sinha, Banarsi Prasad Jhunjhunwala and Harnandan Sahai—for Appellants.

Bankim Chandra De—for Respondent.

Judgment.—These appeals arise from orders passed by the Subordinate Judge of Deoghar declining to substitute the widow of a ghatwal as judgment-debtor in the place of her deceased husband on claims obtained in the one case for the rents of property held by the deceased ghatwal in his private capacity and in the other case decretal money obtained against the deceased ghatwal also in his personal capacity. The learned Subordinate Judge based his decision on the view that the ghatwal's estate was not liable for these personal debts and therefore the widow as his successor to the office of ghatwal could not be brought upon the record. In this view we are of opinion that the learned Subordinate Judge was in error by reason of his oblivion of the fact that the widow succeeded to the ghatwal's personal property as his heir irrespective of any question of her succession to the office of ghatwal. We therefore direct that the widow be brought upon the record as the representative-in-interest of the deceased Raj Narain Deo, it being clearly understood that any execution that may be taken against her with regard to the personal debts of the deceased be limited to property which may come into her possession in her personal capacity and that no assets that will come into her possession by her succession to the rights of the ghatwal will be liable to be pursued. We note that the learned Subordinate Judge has in his orders of 5th February 1917, and 2nd September 1917 not arrived at a decision as to what may constitute the property which has come into the hands of the widow as the personal property of the deceased husband. These matters may now be gone into. We make no order as to costs in these appeals. The records may be sent down at once.

V.S./R.K.

Records sent down.

A. I. R. 1919 Patna 468

ROE, J.

Lachman Sahu — Plaintiff — Appellant.

v.

Abdul Karim and others—Defendants—Respondents.

Stamp Reference, Decided on 28th March 1919, from decision of Dist. Judge, Gaya, D/- 5th December 1918.

Court-fees Act (1870), S. 17—Landlord, suit by, against several sets of tenants, for declaration that they pay batai and not cash rents—Court-fee payable is Rs. 10 for each set of defendants.

Where a landlord sues a number of tenants, each having a separate interest in his particular holding, for a declaration that their lands are held under the batai system, and that they are wrongly recorded as paying cash rent, he must pay a court-fee of Rs. 10 in respect of each set of tenants. [P 469 C 1]

Kailas Pati—for Appellant.

FACTS of the case appear from the following order of reference by the taxing officer:—This is a court-fee matter. The landlord plaintiff sued a number of tenants having land in these villages for a declaration that their lands were held under the batai system, and that they were wrongly recorded as paying cash rent in the recent settlement. The plaint was filed on a court-fee stamp of Rupees 11-4-0 calculated ad valorem on Rs. 150, the value of the suit. The suit was decreed by the trial Court. The tenants appealed on the same court-fee, and the decree of the lower Court was modified. The plaintiff landlord has appealed to this Court. Defendants' allegation was that the bhaoli lands were commuted into nakdi lands in 1319 by registered pattas and kabuliyats. There are 25 different holdings in the possession of 25 different sets of tenants. Each set has interest only in their particular holding. Only one cause of action is given namely that the holdings are batai but have wrongly been entered as nakdi in the recent settlement. The date of the final publication of the Record of Rights is taken as the date of cause of action. The Stamp Reporter is of opinion that the suit, so far as it concerns each set of tenants, constitutes a distinct subject within the meaning of S. 17, Court-fees Act, and that therefore the total fee should be Rs. 10 into 25=Rs. 250, as the plaintiff has really united 25 suits into one. Appellant's vakil does not accept the report. He refers me to 22 C. L. J. 57

Dhakeshwar Prosad Narain Singh v. Iswardhari Singh (1). In that case a landlord instituted a suit against a number of tenants, alleging that the proprietor's share of the produce rent had been entered wrongly in the Record of Rights and in the fard reqauz bhaoli, and that the rates of rent payable by the tenants varied according to their occupation and to the caste to which they belonged.

It was held that a separate suit ought to have been instituted with respect to each class of tenants, i.e. such of the tenants as belonged to the same caste or followed the same occupation. If there were ten such tenants belonging to one caste and occupation, the High Court were of opinion that one suit might have been brought against the ten tenants with a court-fee of Rs. 10 because the same declaration would have to be made with respect of all ten tenants. The Stamp Reporter has mentioned a ruling of the Taxing Judge *Chethru Mahton v. Khaja Muhammad Karim Nawab* (2). The position in that case was practically the opposite to the present one. There 78 sets of tenants as plaintiffs brought one suit with regard to 78 separate holdings alleging that the settlement authority recorded rents considerably higher than the proper rents, and that subsequently the zamindar had obtained decrees for these higher rents. In that case the taxing officer's opinion, with which the taxing Judge agreed, was that there were 78 causes of action in regard to the declaration as to the rent, and 59 causes of action in regard to the decrees which the plaintiffs desired to have set aside, and each of these 137 causes of action carried a court-fee of Rs. 10. In that case each tenant wanted two declarations in regard to his holding; in this case the landlord wants one declaration against all the 25 sets of tenants. In the present case I do not think that there can be any question that under O. 1, R. 3, plaintiff can join all the defendants in one suit, because the right to relief arises from the publication of the Record of Rights, and if separate suits had been brought, a common question of law and fact would arise. This would seem clear from the pleadings of both parties. S. 17, Court-fees Act, refers to a suit which

(1) [1915] 30 I. C. 862.

(2) [1920] 4 Pat. L. J. 297.=50 I. C. 328.

comprises two or more distinct subjects. The question is whether, when each set of defendants has no interest in the holding of any of the other defendants, the rent of each holding is a distinct subject. The question is of real importance because such cases may often arise after publication of the Record of Rights, when a landlord may have to bring suits against groups of tenants on the allegation that the Record of Rights is incorrect in regard to the khatian of each separate holding. As the position would seem to be exactly the reverse of that in *Chethru Mahton v. Khaja Muhammad Karim Nawab* (2), the present case should be placed before the taxing Judge for orders. If Rs. 10 has to be paid for the declaration against each set of tenants, there will be a deficit of Rs. 238-12-0 in all three Courts.

Judgment.—The ratio decidendi must be the same as in *Chethru Mahton v. Khaja Muhammad Karim Nawab* (2). Each separate subject requires a fee of Rs. 10. The rent of each raiyat is a separate subject.

V.S./R.K.

Order accordingly.

A. I. R. 1919 Patna 469

DAS, J.

Jagdeep Sahay and others — Plaintiffs
— Appellants.

v.

Sonu Lal and others — Defendants—
Respondents.

Second Appeal No. 676 of 1918, Decided on 14th July 1919, against decision of Dist. Judge, Patna.

(a) **Transfer of Property Act (4 of 1882), S. 55 (2) (b)** — Title to purchaser passes on execution of deed of sale—Seller is entitled to charge for amount of purchase-money—Contract that no title would pass must be proved.

In a sale of immovable property, title to the property passes to the purchaser on the execution of the deed of sale, although the seller is entitled to a charge on the property for the amount of the purchase-money or any portion thereof remaining unpaid to him with interest thereon, unless there is a contract between the parties that title to the property will not pass to the purchaser until the full consideration has been paid; but such a contract must be alleged and proved by the party setting it up. [P 470 C 1,2]

(b) **Election—Remedies several—Choice of one—Rest of the remedies are barred.**

If two remedies are equally available to a party, and he pursues one remedy and fails therein, equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot

turn round and say, when he fails therein, that he will now pursue the other remedy open to him. [P 471 C 1]

S. N. Palit and Bimola Charan Sinha
—for Appellants.

Kulwant Sahai and Siveshwardayal—
for Respondents.

Judgment.—This appeal arises out of a suit brought by the appellants against the respondents for an order upon the defendants to make over a sale deed to the plaintiffs, for possession of the property covered by the sale deed, dated 6th January 1916, and for other incidental reliefs. The facts so far as they are necessary for the determination of this appeal are as follows: On 6th January 1916, defendant 1 did execute a properly registered conveyance in respect of the properties in suit in favour of the plaintiffs. Subsequently defendant 1 sold the same properties to defendants 2 to 4, and it is on the basis of the sale deed, dated 6th January 1916, that the plaintiffs have brought the suit out of which this appeal arises.

The defence of defendant 1 is that the document was procured from him under circumstances which negative the implication of a free consent on his part and that therefore he never executed the document in favour of the plaintiffs and that he is not bound by it at all. It will be noticed that he does not set up a case that there was a contract between him and the plaintiffs that the conveyance would not be operative until the full consideration money is paid. It is important to remember this fact in view of the finding of fact arrived at by the lower appellate Court. The Court of first instance found that the document of 6th January 1916 was a genuine document and was executed for consideration. It found that the consideration of the conveyance was Rs. 450 and that the plaintiffs had out of that consideration deducted Rs. 175 and Rs. 160 in respect of the money due to them from defendant 1 on account of certain other transactions. It further found that Rs. 20 was paid by the plaintiffs in cash to defendant 1 and that Rs. 95 still remained to be paid by the plaintiffs to defendant 1. Upon this finding the Court of first instance gave a decree to the plaintiffs conditional on the plaintiffs paying in Rs. 95 within one month to defendant 1. The Court of first instance further decreed that on failure on the

part of the plaintiffs to pay in Rs. 95 within a month, the plaintiffs should get a money decree for Rs. 160 which was due from defendant 1 to the plaintiffs and for Rs. 20 which had been paid by the plaintiffs to defendant 1. Against this decree there was an appeal to the lower appellate Court. But it will be convenient to deal with another matter before I deal with the decision of the lower appellate Court.

It appears that the plaintiffs could not pay Rs. 95 into Court within the time specified in the decree of the Court of first instance. Therefore, on 12th July 1917, the plaintiffs made an application to the Court of first instance for enlargement of the time to enable them to pay Rs. 95 into Court. That application was refused, and, as I have stated before, the plaintiffs appealed from the decision of the Court of first instance. The lower appellate Court does not dissent from the finding of the Court of first instance that the sale deed was duly executed for a consideration of Rs. 450, but it thought that because the plaintiffs had not paid the full consideration money to defendant 1, the plaintiffs' suit should have been dismissed by the Court of first instance. In my opinion that is entirely erroneous. It is obvious that the title accrued to the plaintiffs on the execution of the sale deed. If the full consideration had not been paid by the plaintiffs to the defendant, the defendant would have a lien on the property sold for the unpaid purchase-money, but it cannot for a moment be argued that title to the property would not pass until the full consideration money had been paid. S. 55, T.P. Act, is perfectly clear on this point. S. 55, Cl. (4) (b), provides that where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part. Therefore it recognizes that the title passes to the purchaser on the execution of the document, although the seller is entitled to have a charge on the property for the amount of the purchase-money or any portion thereof remaining unpaid to him with interest thereon. No doubt the opening words of S. 55, T. P. Act, are :

"In the absence of a contract to the contrary."

There may, no doubt, be a contract between the parties that title to the property will not pass to the purchaser until the full consideration money has been paid, but such a contract must be alleged and proved and the onus would undoubtedly lie on the party setting up the contract. As I read the judgment of the lower appellate Court, it finds that there was such a contract in this case, but, in my opinion, the lower appellate Court was not entitled to make a case for the defendant which the defendant himself did not make. The whole case of the defendant in the written statement filed before it is that he never executed the conveyance dated 6th January 1916. That was the only matter before the Courts below and the Courts below have found that the story told by the defendant is false. In my opinion the lower appellate Court was not entitled to go into the question whether there was or was not a contract to the contrary in this case. I am of opinion therefore that so far as this question is concerned, it must be held that title to the property passed to the plaintiffs and unless there be some sort of equity in favour of the defendant, the plaintiffs are entitled to the reliefs claimed by them in the plaint. But it is urged on behalf of the respondents that there is in fact such an equity in this case in favour of the defendants. The learned vakil appearing on behalf of the respondents relies upon the petition for enlargement of time put in by the plaintiffs on 12th July 1917. The argument, so far as I have been able to understand the same, is that the plaintiffs by putting in the application on 12th July 1917 adopted in its entirety the decree which was passed by the Court of first instance, and therefore the plaintiffs could not file an appeal from the decree of the Court of first instance.

The argument, so far as I understand the same, is an argument that the plaintiffs have elected one remedy and therefore are estopped from pursuing another remedy. In my opinion the argument is not wellfounded. It has been repeatedly held that election is the choice between two or more co-existent and inconsistent remedies. It is really based on the principle of estoppel. If two remedies are equally available to a party and if with

his eyes open he pursues one remedy and if he fails therein, equity will step in and prevent him from pursuing the other remedy, because he chooses one remedy at his own peril and cannot turn round and say when he fails therein that he will now pursue the other remedy which was available to him. But in this case can it be said that the plaintiffs had two inconsistent remedies? On the findings of the Court of first instance there was a sum of Rs. 95 undoubtedly due by them to defendant 1. They could pay in Rs. 95 to defendant 1 and yet challenge that portion of the decree which said that unless they paid in Rs. 95 they could not get a conveyance of the property in their favour. In my opinion the remedies were not inconsistent at all. The plaintiffs are undoubtedly liable to pay Rs. 95 and they could appeal from the decree passed by the Court of first instance and yet pay in Rs. 95 to defendant 1. If the remedies available to the plaintiffs were not inconsistent in any way, then no question of estoppel by election arises in the case at all. In my opinion the judgment and decrees of the Courts below cannot be sustained.

I would therefore allow this appeal, set aside the judgments and decrees of the Courts below and give the plaintiffs a decree in terms of the reliefs Nos. 1, 2, 3 and 4 claimed by them. Defendant 1 is undoubtedly entitled to a lien on the property in respect of the money still remaining unpaid. He can pursue that remedy, but I do not think that I should in this decree fix a time within which the plaintiffs must pay Rs. 95 to defendant 1. I make no order as to costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 471

ROE, J.

Manik Chand Ram—Appellant.

v.

Mt. Bibi Najiban—Respondent.

Second Appeal No. 766 of 1918, Decided on 31st May 1918.

Court-fee—Appeal—Suit for possession and mesne profits valued at value of land and antecedent mesne profits—Mesne profits not ascertained by Court—Appeal challenging whole decree must bear same court-fee as suit.

A suit for recovery of possession of land and mesne profits which was valued at the value of the land plus the amount of antecedent mesne profits was decreed in its entirety, but the Court did not ascertain the amount of mesne profits.

The defendant appealed, challenging the whole decree :

Held : that the appeal must be valued at the same valuation as the suit and must bear the same court-fee stamp. [P 472 C 1]

Kulwant Sahai and Nawal Kishore Prasad—for Appellant.

Facts.—This was a suit for khas possession of certain raiyat kasht land valued at Rs. 380 and for recovery of mesne profits past and future brought against five defendants. The antecedent mesne profits claimed amounted to Rs. 2,214-7-0. Thus the suit was valued at Rs. 2,594-7-0, the total value of the land and of the amount of antecedent mesne profits. The plaint was stamped with a court-fee stamp sufficient to cover that valuation. The suit was decreed for possession and mesne profits against defendant 1. The trial Court did not ascertain the amount of mesne profits, but left it to be determined later on. The contesting defendant appealed to the District Judge and challenged the whole decree of the trial Court. The appeal was dismissed. The defendant thereupon appealed to the High Court, again challenging the whole decree. The appellant valued his appeal in the lower appellate Court at Rs. 380 only, the value of the land, omitting the amount of antecedent mesne profits from the valuation and paid court-fee on Rs. 380. The appeal in the High Court was similarly valued and similarly stamped. The stamp reporter objected that the appeals to the lower appellate Court and to the High Court were undervalued and understamped. He submitted that each of the appeals should have been valued at Rs. 2,594-7-0, the value of the suit inclusive of antecedent mesne profits, and an ad valorem court-fee on that amount should have been paid on the memorandum of appeals because the grounds taken in the memorandum of appeals in both the Courts went to the root of the plaintiff's case and challenged the whole decree. He relied on *Brahmayya v. Lakshminarasimham* (1), *Bujhawan Rai v. Makund Lal* (2), *Dilawar Husain v. Bhagwat Das* (3) and *Banwari Lal v. Sheo Sunkar Misser* (4). The question of court-fee was referred by him to the Taxing Officer. The Taxing Officer agreed with the stamp reporter but considering the case to be

(1) [1893] 16 Mad. 310.

(2) [1892] 15 All. 112.

(3) [1907] 4 A. L. J. 130.

(4) [1909] 1 I. C. 670.

of general importance referred it to the Taxing Judge. In the course of his order of reference he observed as follows :

"Defendant 1 in his first appeal contested the whole decree and asked for it to be set aside. But he valued his appeal at Rs. 380, the value of the land, and paid a court-fee of Rs. 28-8 0 only. He has done the same in his second appeal to this Court. This is, in my opinion, wrong. The appellant was bound to value his appeal at the valuation in this plaint. This value was, as I have said, Rs. 2,594-7-0 and on this he should have paid a court-fee of Rs. 155 both in the lower appellate Court and in this Court. It is contended however that the amount of mesne profits not having been ascertained by the first Court, the appellant was not bound to pay court-fee on this amount. This matter however has been fully discussed in the case reported as *Banwari Lal v. Sheo Sankar Misser* (4). In that case the whole question was very fully considered and it was held that although the amount of mesne profits was not ascertained, the appeal should be valued at the same amount as the plaint and the court-fee paid accordingly. This decision is, I consider, correct."

Order.—The learned vakil is not prepared to contest the learned Registrar's decision and will pay the deficit court-fee, if allowed time. The learned Registrar will deal with the question of the time within which the court-fee is to be paid.

V.S./R.K.

Order accordingly.

A. I. R. 1919 Patna 472

DAWSON-MILLER, C. J. AND ROE, J.

Sukuru Mali—Appellant.

v.

Brahmapura Balbhadra Mahaprabhu—Respondent.

Appeal No. 8 of 1918, Decided on 16th April 1919, from appellate decree of Sub-Judge, Sambalpur, D/- 11th January 1918.

(a) **Hindu Law—Alienation—Father can alienate only for antecedent debt or for necessity.**

Among Hindus governed by the Mitakshara law a father has no sort of power to alienate family property, unless the alienation is made in consideration of a pre-existing debt or by reason of legal necessity. Any other alienation is not binding on the sons, or indeed upon anybody, and the sons are entitled to have the transaction set aside. [P 473 C 2]

(b) **C. P. Tenancy Act (1898), S. 46 (1)—Act does not interfere with ordinary rights and incidents of joint family property.**

The Central Provinces Tenancy Act does not in any way limit, or interfere with, or render inapplicable, the ordinary rights and incidents attaching to joint family property, in cases where a family is governed by the Mitakshara law, to raiyati holdings in those localities which are governed by the Act. [P 473 C 2]

Baikuntha Nath Dutt and *S. C. Chatterji*—for Appellant.

Satish Chandra Mukherji—for Respondent.

Dawson-Miller, C. J.—This is an appeal by the defendants from the decision of the Subordinate Judge of Sambalpur, dated 11th January 1918, affirming, in part, a decree of the Munsif of 11th June 1917. The facts, so far as they are material to the present appeal, are these: In the year 1897 defendant 1 executed a mortgage in favour of plaintiff 2. On 11th June 1903 the plaintiff, having instituted a suit for that purpose, obtained a decree for foreclosure against defendant 1 in the Court of the Extra Assistant Commissioner of Sambalpur, and on 5th March 1904 that decree was made absolute. In July of the same year plaintiff 2 obtained possession of the property, and on the following day was dispossessed by the defendants. About four years later, namely on 22nd December 1908, plaintiff 2, by a deed of gift, being at that time still out of possession, made over his interest in the property in question to plaintiff 1, who is an idol. Plaintiff 3 is the son of plaintiff 2 and defendant 2 is the son of defendant 1. The three plaintiffs, on 28th July 1906, having been out of possession of the property for nearly twelve years, instituted the present suit, claiming a declaration of title to the land in question and possession after ejectment of the defendants. Various defences were raised by the defendants to the suit, but the only one with which we are concerned in this appeal is a defence which was raised as an amendment to the written statement of defendant 2. It is to this effect, that the property in suit is the ancestral immovable property of the defendant; that at the date of the alleged mortgage of 18th August 1897 and of the decree in the suit for foreclosure defendant 2 was a minor, and that the debt contracted by defendant 1 was not made for any legal necessity or moral purpose, and that defendant 2 is therefore not bound by the mortgage or the decree, and he further pleaded, which perhaps is the same thing in another form, that defendant 1 had no right to mortgage the property even to the extent of his own share; or if he had, that defendant 2's right to redeem the property still subsists.

It is not disputed, indeed it is alleged, in the plaint that until three years ago,

that is, three years from the date of the plaint which was filed in 1916, defendants 1 and 2 were members of a joint family, and it is found that the property in question in the suit was the family property. The property which was mortgaged consisted partly of bhogra lands and partly of raiyati lands, and when the case came before the Munsif he, whilst finding that the property was ancestral property of defendants 1 and 2, which, in fact, is not disputed, decided all the other issues, which were numerous but which it is unnecessary to go into for the purposes of this appeal, against the defendants. He came to the conclusion that the mortgage was granted for legal necessity, and that defendant 2 could not in such a case question the foreclosure decree. In deciding the question of whether there was any evidence that the mortgage was not granted for necessary purposes, the learned Munsif appears to have put the onus upon the wrong party, and he decreed the suit in favour of the plaintiffs. The defendants appealed from this decision to the Subordinate Judge, who arrived at a different conclusion of fact on the question of legal necessity, placing the onus on the right party. He found that no legal necessity had been proved which in law would justify the mortgage. In these circumstances he allowed the appeal of the defendants with respect to the bhogra lands. With regard to the raiyati lands he arrived at a special finding, which, in his opinion, excluded them from the operation of the ordinary incidents attaching to ancestral property. I cannot do better than read the Judge's own words on this question. He disposes of it in this way:

"It is an admitted fact that the properties were ancestral. It was however urged by the learned pleader for the respondent that the mortgaged properties consisted of bhogra and raiyati lands; that in respect to the latter the son had no vested interest by birth owing to the peculiar nature of the raiyati interests in this district, as has been laid down in a series of decisions of the Judicial Commissioner, Central Provinces. So far as I know, the decisions have not been doubted anywhere. I accordingly hold that the mortgage and foreclosure decrees were valid in respect of the raiyati lands".

From that decision the defendants have preferred this second appeal. The plaintiffs are content with the judgment of the Subordinate Judge and have not appealed. The contention of the appellants is that once it is admitted that this is

family property, then it cannot be disputed that defendant 2 had, at the time the mortgage was entered into by his father, a vested interest in that property as a member of a joint family. At the time of that transaction in 1897 defendant 2, if his age is correctly stated in the plaint, would be a boy of some eleven years, and his contention is one which appears to me to be absolutely unassailable that his father had no sort of power to alienate family property unless the alienation was made in consideration of a pre-existing debt or by reason of what is called legal necessity. It is not suggested in this case that there was any pre-existing debt, and it has been found by the lower appellate Court that the mortgage was not granted for any necessity such as would justify a transaction of that sort. It seems therefore to follow that this mortgage transaction is not binding upon the son or indeed upon anybody, and that the son having come of age is clearly entitled to assert his rights which have not been extinguished, and to have the whole transaction set aside.

The respondents however contend, following the conclusion arrived at by the Subordinate Judge, that the ordinary rights and incidents attaching to joint family property in cases where a family is governed by the Mitakshara law, as in this case, do not apply to raiyati holdings in those localities which are governed by the Central Provinces Tenancy Act. For that contention they rely upon the decision of Mt. Stanyon at that time Second Additional Judicial Commissioner in the Central Provinces, in the case of *Ghanya v. Ukund Rao* (1). The passage there relied on is to this effect:

"The Tenancy Act does not recognise such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on. Any tenant may surrender a holding whenever he pleases; if he leaves it uncultivated for two years in some cases he is deemed to have surrendered it. Such provisions obviously ignore anything resembling vested interest in the tenant's sons or other heirs."

I wish to point out that in the particular case in which these observations were made it was not necessary for the learned Judicial Commissioner to decide the question which he is there dealing with. That was a case where there had been a separation between four brothers who were joint. Two of these brothers,

(1) [1908] 4 N. L. R. 9.

immediately after separation, mortgaged some of the property which formed their share after partition. Subsequently the sons of another brother, who was not a party to that transaction, claimed to set aside that mortgage on the ground that at the time the mortgage was executed they, as members of a joint family, had a vested interest in the property. It was found, as a fact, that a partition had taken place and the sons of one of the brothers who were joint before partition had no right to impugn the validity of any transaction made by any of the other brothers in respect to their portion of the property after partition. I have looked through the Tenancy Act, and we have been referred to certain sections of it, and the only section which has been quoted to us as establishing the proposition contended for by the respondents is S. 46, sub-S.(1), which is in these terms:

"When an occupancy tenant dies his right in his holding shall devolve as if it were land."

I confess I can see nothing in that section which in any way supports the contention put forward by the respondents in this case. It may be that under the special provisions of this Act occupancy raiyats have certain powers of alienation, and certain rights may also be prescribed by the Act as between themselves and their landlords; but, except so far as ordinary incidents of an occupancy raiyat may be specially limited or extended by the Act, I can find nothing in the Act which in any way purports to interfere with the ordinary rules of law governing members of a Mitakshara family and relating to their rights in the ancestral property. It seems to me therefore that the learned Subordinate Judge's decision on this point cannot stand. This appeal will be allowed with costs here and below; the judgment and decree of the lower appellate Court will be set aside, and judgment will be entered for the defendants in the suit.

Roe, J.—I agree. I can see no justification for the suggestion that an occupancy right in the Central Provinces is a thing any more peculiar than an occupancy right in Bihar. The erroneous impression in the mind of the Subordinate Judge seems to be due to a misunderstanding of the well-worn dictum that an occupancy right is a personal right. It is a personal right in this sense only, that what has been done by one person to-

wards the acquisition of an occupancy right cannot be continued and completed by another. It is also true to say that an occupancy right may be acquired by a contract between the landlord and the person; but in considering this point of view it is necessary to recognize that a person, need not necessarily be an individual. It may be a firm or a body corporate or a joint family, and a landlord in contracting with an individual may be dealing with a whole family represented by that individual. An occupancy right may be, and frequently is, a part of the ancestral estate. It has been found as a fact in this case to have been a part of the ancestral estate, and therefore the younger sons of a Mitakshara joint family had interests in it which it was beyond the power of the father to destroy or encumber for anything but a family purpose. I agree that the suit should have been dismissed with costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 474

ATKINSON, J.

Abdul Aziz and others—Judgment-debtors—Appellants.

v.

Mt. Bibi Tauhidunnissa—Decree-holder—Respondent.

Appeal No. 22 of 1919, Decided on 26th June 1919, from appellate order of Dist. Judge, Patna, D/- 2nd December 1918.

(a) **Cosharer—Rent—Suit by cosharer proprietor to recover his share of rent without joining others—Decree is money decree and not rent decree.**

Where a plaintiff sues as a cosharer proprietor to recover in one suit his share of the rent of more holdings than one without joining his other cosharers as parties to the suit, the decree obtained by him in such a suit is a money decree and not a rent decree. [P 474 C 2]

(b) **Landlord and Tenant—Rent decree—Holding not transferable—Tenant can assert right that landlord is not entitled to bring holding to sale.**

A tenant is entitled to assert in execution proceedings the right that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree if the holding is not transferable. [P 475 C 2]

Sd. Mohd. Hafiz—for Appellants.

Sd. Mohd. Tahir—for Respondent.

Judgment.—This miscellaneous appeal comes before me from the decision of the District Judge of Patna dated 2nd December 1918. The plaintiff sues as a cosharer proprietor to recover in one suit his share of the rent of more than

one holding without joining his other co-sharers as parties to the suit. The tenant against whom the decree has been obtained contends first, that the decree so obtained is not a rent decree in the ordinary acceptation of the term as understood and defined by the Bengal Tenancy Act, but that it is merely a money decree, and that consequently in the execution of such decree the plaintiff as a cosharer proprietor is not entitled to bring the holding to sale in respect of such decree. Secondly it is contended by the tenant by way of petition against the sale of the holding in execution proceedings that the holding being nontransferable by custom the tenant is entitled to prohibit the landlord from selling the same without the tenant's consent if the holding is brought to sale in execution of a rent decree.

The learned Munsif found in favour of the respective contentions put forward on behalf of the tenant, and struck off the execution proceedings. On the other hand the learned District Judge took a contrary view and held that though the decree that was obtained was strictly speaking a money decree, that yet as it was a decree between two persons occupying the position of landlord and tenant, the tenant was debarred from raising as against the landlord the contention that the holding could not be sold by reason of there being no custom in favour of transferability, and the learned Judge therefore directed that the execution proceeding should proceed. In my opinion the learned Judge was clearly wrong in the conclusion at which he arrived. It is established by a long and consistent line of authority that where a landlord seeks to recover in one suit the rent of more than one holding a decree so obtained in such suit is a money decree and not a rent decree; and this is so in cases where a landlord as a cosharer seeks to recover in one suit his shares of the rent of more than one holding, without joining his cosharer proprietors as parties to the suit. All the cases are collected in Mr. Sen's Book on the Bengal Tenancy Act, p. 602. In all there are some 12 or 15 authorities in support of the contention put forward by the defendant. The following authorities may be referred to: *Hridaynath Das Chowdhry v. Krishna Prasad Sircar* (1), *Baikanta Nath Roy*

(1) [1907] 34 Cal. 298.

v. Thakur Debendro Nath Saha (2), *Bipra Das Dey v. Rajaram Bandopadhyaya* (3) and *Rashmohini Dasi v. Debendra Nath Singh* (4).

Accordingly in my opinion the decree that was obtained by the plaintiff in this suit was not a rent decree but a money decree; and the fact that the cosharer proprietors of the plaintiff were not joined as parties to the proceedings in my opinion negatives the possibility of the decree that was obtained by the plaintiff being a rent decree. The question remains to be considered whether the defendant as a tenant is entitled to object to the landlord selling the holdings in respect of which a decree for rent was obtained on the ground that the holdings were not transferable by custom. This proposition has been considered three times in this High Court since its constitution and the point now urged before me seems amply covered by authority. The case reported as *Macpherson v. Debi Bhushan Lal* (5) is an express authority that a tenant in execution proceedings is entitled to assert the right that the landlord is not entitled to bring a holding to sale in pursuance of a rent decree if the holding is not transferable. A tenant's right of occupation of a nontransferable holding is merely a personal right which a tenant is entitled to assert as against his landlord, and a landlord has a corresponding right as against his tenant; and this is so whether the alienation contemplated by either is voluntary or involuntary.

The cases reported as *Macpherson v. Debi Bhushan Lal* (5) was followed in a later case reported as *Madhu Padhan v. Jagu Jena* (6). The case reported as *Madhu Padhan v. Jagu Jena* (6) is stated to be distinguishable by reason of the fact that it was a decision upon the construction of the transfer section of the Orissa Tenancy Act; but a perusal of that section would show that the principle of that decision equally applies to cases under the Bengal Tenancy Act where holdings are not transferable save by custom or consent. Like authorities are to be found decided in the cases reported as *Sadari Kunwari v. Palaknath* (7). Therefore I am satisfied on authority

(2) [1907] 11 C. W. N. 676.

(3) [1903] 36 Cal. 765=3 I. C. 306.

(4) [1912] 13 I. O. 64.

(5) [1917] 2 P. L. J. 530=42 I. C. 36.

(6) [1919] 4 P. L. J. 294=51 I. C. 139.

(7) [1916] 1 P. L. J. 257=33 I. C. 937.

that the learned District Judge was wrong and that the decision of the learned Munsif was right. The plaintiffs are only entitled to a money decree and are not entitled by virtue of that fact to bring the holding to sale and if the decree be a rent decree the defendant as tenant is entitled as against the landlord to assert that the holding cannot be sold by reason of the fact that it is non-transferable. Accordingly I reverse the order of the learned District Judge and I direct that the execution proceeding be struck off, and I award three gold mohurs costs as against the respondents.

V.S./R.K.

Order reversed.

* A. I. R. 1919 Patna 476

DAS, J.

Meghu Singh and others—Petitioners.
v.

Basudeva Jha and others—Opposite Parties.

Misc. Appeal No. 115 of 1919, and Civil Rule. No. 122 of 1919, Decided on 8th July 1919, from decision of Dist. Judge, Darbhanga.

* (a) Civil P. C. (1908), S. 47, O. 21, and R. 97—Application by auction-purchaser for recovery of possession as against prior auction purchaser falls under O. 21, R. 97, and not under S. 47.

An application by an auction-purchaser, alleging that he was obstructed by the opposite party in obtaining possession of the property purchased by him on the ground that the latter was a prior auction-purchaser, and praying that he might be put in possession, is an application under O. 21, R. 97, and not under S. 47 of the Code.

[P 476 C1. 2]

(b) Civil P. C. (1908), O. 21, R. 97—Order under O. 21, R. 97, is not open to second appeal.

An order made under O. 21, R. 97, Civil P. C., is not appealable to the District Court and is consequently not open to second appeal.

[P 477 C 1]

Purendu Narain Singh and Murari Prosad—for Petitioners.

Lakshmi Kant Jha—for Opposite Parties.

Judgment.—These analogous matters come before me from the judgment of the District Judge of Darbhanga and arise out of a proceeding instituted by the appellants for delivery of possession. It is a matter of dispute between the parties whether the application of the appellants was an application under S. 47, Civil P. C., or it was an application under O. 21, R. 97, Civil P. C. If it was an application under O. 21, R. 97, Civil P. C., then it is conceded that there was

no appeal to the lower appellate Court and consequently there is no second appeal to this Court. The facts, so far as they are material for the purpose of these matters, are as follows: There was a decree against the respondents and in execution of that decree the appellants purchased the holding which was of the judgment-debtors. The appellants went to take possession of the property purchased by them, when they were resisted by the respondents before me who claim to be the prior purchasers of the property from the judgment-debtors.

Owing to this obstruction the appellants presented a petition before the learned Munsif stating that they had been obstructed by the respondents and asking for possession to be made over to them. It is true that the appellants did not describe their application either under S. 47 of the Code or an application under O. 21, R. 97, but it is pointed out that if they were making an application under O. 21, R. 97, the allegations would have been exactly the same. Upon the presentation of this application the respondents came before the Court and filed two petitions objecting to the deputation of the nazir. Upon this the Court treated the appellants' petition as a petition under O. 21, R. 97, and it proceeded to investigate the matter under O. 21, R. 97. No objection was taken to this procedure by the appellants. The Court came to the conclusion that the decree obtained against the judgment-debtors was a money decree and that the respondents were the prior purchasers of the property. Accordingly the Court of first instance dismissed the appellants' application altogether. The appellants appealed to the lower appellate Court. The lower appellate Court came to the conclusion that there was no right of appeal at all from an order passed in an application under O. 21, R. 97. The learned vakil appearing on behalf of the appellants in this Court contends that the application was not an application under O. 21 at all, but under S. 47. I am of opinion that this contention must be overruled because, in my opinion, they never objected to the procedure adopted by the Court of first instance when the application was put in on their behalf.

Therefore it must follow that there is no appeal in this Court. The learned vakil however argues that the lower ap-

pellate Court should have decided the question whether the decree obtained by the Maharaja of Darbhanga was a rent decree or a money decree, and in declining to decide that question it has declined a jurisdiction which was vested in it by law, and that therefore this Court should interfere with that order under S. 115, Civil P. C. In my view the Court of first instance in an elaborate judgment came to the conclusion that the decree was a money decree and not a rent decree. It may be that that decision is erroneous, but the Court of first instance had jurisdiction to decide the question in the way it did. It follows that the learned District Judge had no power to interfere with that finding under any provision of the Code at all and, in my opinion, I have no power to interfere with the order recorded by the Court of first instance on this point. In my opinion the second appeal fails and must be dismissed with costs, and the Rule obtained by the petitioner must also be discharged with costs, which I assess at one gold mohur.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 477

DAS, J.

Babu Khan and others—Petitioners.

v.

Raj Kishore Pershad Narayan Singh and others—Opposite Parties.

Criminal Revn. No. 109 of 1919, Decided on 14th May 1919, against order of Subdivisional Officer, Behar.

Criminal P. C. (1898), S. 147—Order under S. 147 is without jurisdiction if made without finding that right in dispute is exercised within 3 months anterior to inquiry.

An order under S. 147 is without jurisdiction if it is made in the absence of any finding that the right in dispute was exercised within 3 months anterior to the inquiry. [P 478 C 1]

In order to vest a Court with jurisdiction to deal with a matter under S. 147, Criminal P. C., it must appear that where the right to do such thing is exercisable at all times of the year, the right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only in particular seasons or on particular occasions, the right has been exercised during the last of such seasons: 19 I. C. 959, *Rel. on.*; 5 C. W. N. 67, *Dist.*

[P 477 C 2]

*Abkari, Khurshed Husnain and Nawal Kishore Prasad—for Petitioners.**Ganesh Dutt Singh and Jalgobind Sinha—for Opposite Parties.*

Judgment.—I am of opinion that the order passed by the learned Subdivisional Officer of Bihar under S. 147, Criminal P. C., must be set aside on the ground that he has not shown that the right claimed by the second party has been exercised during the last season. The dispute between the parties refers to the right claimed by the second party to put a dam across the mouth of a Pyne. The first party says that the second party has no such right. The Court has come to the conclusion that the second party has such right and "that they have all along been exercising that right." It is argued before me by Mr. Akbari on behalf of the first party petitioners that in order to vest a Court with jurisdiction to deal with a matter under S. 147, it must appear that where the right to do such thing is exercisable at all times of the year, the right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only in particular seasons or on particular occasions, the right has been exercised during the last of such seasons. In this case the second party claims the right to erect the dam only at particular seasons, in fact only once a year. Therefore, Mr. Akbari argues that the Court has no power to permit the second party to construct the bandh unless it is of opinion that the right has been exercised during the last season.

The Court however comes to the finding that they have all along been exercising that right. In my view this is not the same thing as saying that the right has been exercised during the last of such seasons, because it may be that the second party has been constructing a dam year after year for the last fifty years but they did not construct a dam during the last season. The Court on those facts would be entitled to come to the conclusion that they have all along been exercising that right and yet could not come to the conclusion that the right has exercised during the last of such seasons. This argument is considerably strengthened by form No. 24 given in Sch. 5. I may also refer to a case reported as *Gur Prasad Dhar v. Lachman Ram Ghose* (1). In that case it was laid down by Sir Richard Harington and Coxe, J., that an order under S. 147,

(1) [1913] 19 I. C. 959.

Criminal P. C., is without jurisdiction if it is made in the absence of any finding that the right was exercised within three months anterior to the inquiry. The learned Judges in that case say :

"If the Magistrate reads the proviso to S. 147, he will see the procedure to be followed before he can make an order under S. 147, and if he looks at the form No 24, Sch. 5, he will notice that the legislature has provided a form in which the order should go."

Mr. Ganesh Dut Singh, however relies upon a case reported as *Pasupati Nath Bose v. Nando Lal Bose* (2). In that case what was claimed was an uninterrupted use of the water of the nullah, and the Court recorded a finding that the first party, the ticcadar and zamindar, had proved an uninterrupted use of the water of this nullah for twenty years which they had enjoyed as an easement and as of right. Clearly on the facts of that case that finding was quite sufficient to invest the learned Magistrate with jurisdiction to deal with the matter under S. 147 because the right claimed was an uninterrupted right, but here the right claimed is to erect a bandh only once a year at a particular season. Therefore in my view the decision in *Pasupati Nath Bose v. Nundo Lal Bose* (2) is not to the point.

I hold that in the absence of a finding that the right has been exercised during the last season, the order under S. 147, Criminal P. C., passed by the learned subdivisional officer is without jurisdiction and consequently that order must be set aside.

V S /R.K. *Order set aside.*

(2) [1901] 5 C. W. N. 67.

A. I. R. 1919 Patna 478

ROE, J.

Pandit Singh—Appellant.

v.

Mode Narain Singh—Respondent.

Misc. Judicial Case No. 101 of 1918,
Decided on 5th June 1918.

Court-fees—Appeal—Suit dismissed on merits—Appeal—Remand—Second appeal against order of remand—Court-fee payable is ad valorem—Civil P.C. (5 of 1908), O. 41, R. 23.

A suit for the recovery of bhauli rent was dismissed by the trial Court on the merits. On appeal the District Court set aside the decision of the trial Court and remanded the case for the determination of the amount of rent payable. The defendant appealed to the High Court against the order of remand:

Held: that the appeal was one from an appellate decree and not from an order, so that the

memorandum of appeal must bear an ad valorem court-fee stamp. [P 479 C 1]

Kurshed Husnain—for Appellant.

Facts.—In a suit for recovery of bhauli rent the following issues were framed: (1) Is the allegation of payment by division in the case true? (2) What were the kinds and quantities of produce in the years in suit, and what were the sale rates of the produce in the years in suit? (3) Are defendants 3 to 7 in Suit No. 52 necessary parties to the case? Issue 1 was decided against the plaintiff as was also issue 3. Issue 2 was not decided as it was unnecessary on account of the decision of issue 1. Against this decision the plaintiff appeals to the District Judge. The appellate Court set aside the finding of the 1st Court on issue 1 and remanded the case to the Subordinate Judge for the trial of issue 2. Against this decision the present appeal was preferred to the High Court. The memorandum of appeal to the High Court was stamped with a court-fee stamp of Rs. 2. The Stamp Reporter submitted that the memorandum of appeal was undervalued. He submitted that the suit had not been disposed of upon a preliminary point and therefore the order of remand appealed against was not made under O. 41, R. 23, Civil P. C. Therefore the present appeal was not covered by O. 43, R. 1 (u). The appeal was not against an order as described by the appellant, but was an appeal from an appellate decree and should be stamped as such. The taxing officer agreed with the Stamp Reporter, but considering the case one of general importance referred it to the Taxing Judge. In the course of his order of reference, the Taxing Officer observed as follows:

"It cannot be said that the suit was originally disposed of on a preliminary point and consequently this was not an appeal under O. 43, R. 1, Cl. (u). This appeal is in my view a second appeal and should be valued as such."

Mr. Kurshed Husnain, for the appellant, contended that the decision of the 1st Court was on a preliminary point and the order of remand by the lower appellate Court was under O. 41, R. 23. This appeal therefore was an appeal from an order within the meaning of O. 43, R. 1, Cl. (u), and not a second appeal from an appellate decree. He referred to *Ramchandra Joishi v. Hazi Kasim* (1), *Kanakammal v. Ranga Chariar* (2),

(1) [1893] 16 Mad. 207.

(2) [1897] 20 Mad. 25.

Mata Din v. Jamna Das (3), *Mana Vikrama v. Kornavan Gopalan Nair* (4), *Vomula Jambaloya v. Isula Rajamma* (5), *Narayanbhat Bhimbhat Joshi v. Akkubai Manoharbat Joshi* (6), *Shib Sharan Sha v. Janaki Nath Dey* (7), *Chanmalswami v. Gangadharappa* (8), *Kuppelan v. Kunjuvalli* (9), *Salim Sheikh v. Nazir Khan* (10), *Krishnan Chetti v. Muthu Palandi Vacha Makali Tevar* (11) and *Mahant Rachu Gir v. Mahant Raghu Nath Gir* (12).

Judgment.—I have considered the cases quoted by Mr. Husnain. The decision was a decision on the merits and all that is now required is to take an account. The appeal is against the decision on the merits and a court-fee *ad valorem* must be paid. It would have been otherwise if the appeal had been only against the form of the order made, and the relief sought had been an order that the suit be remitted only for decision on the issue undecided.

V.S./R.K.

Order accordingly.

- (3) [1905] 27 All. 691.
- (4) [1907] 30 Mad. 203.
- (5) [1912] 36 Mad. 492=15 I. C. 859.
- (6) [1916] 33 I. C. 576.
- (7) [1913] 21 I. C. 387.
- (8) A. I. R. 1914 Bom. 149=39 Bom. 339=26 I. C. 885.
- (9) [1911] 9 I. C. 790.
- (10) [1908] 8 C. L. J. 159.
- (11) [1899] 22 Mad. 172.
- (12) [1917] 2 P. L. J. 393=41 I. C. 202.

A. I. R. 1919 Patna 479

ROE, J.

Chethru Mahton and others—Plaintiffs—Appellants.

v.

Muhammad Karim Nawab and others—Defendants—Respondents.

Misc. Judicial Case No. 96 of 1918, Decided on 31st May 1918.

Court-fees Act (1870), Sch. 2, Art. 17 (3)—Declaration suit by several sets of tenants against common landlord—Causes of action different—Court-fee must be paid separately for each cause of action.

Where several sets of tenants brought one suit against their common landlord for declaration that their respective holdings were fixed rate holdings and that certain decrees for rent obtained by the landlord against some of the tenants were inoperative:

Held: that there were as many causes of action as there were holdings and decrees, and that those causes of action having been combined in one suit, the plaintiffs could not escape payment of Court-fees under Art. 17 (3), Sch. 2 in respect of each cause of action. [P 480 C 1]

Audh Bihari Choubey—for Appellants—**Facts.**—The defendant, who was the proprietor of several villages, brought several rent suits claiming bhauli rent against several sets of tenants in respect of various holdings situated in different villages. The tenants contested these suits on the ground that their respective holdings had been held at fixed rate from time immemorial. The suits were however decreed. Subsequently the defendant proprietor obtained an appraisal decree in respect of the holdings of those tenants, which was ultimately set aside at the instance of the tenants in regular suit. After this settlement operations began. Before the settlement officers the tenants stated that their lands were held nagdi, but the zamindar, in collusion with the settlement authorities, had got recorded rents higher than the proper rents. Subsequently the zamindar brought rent suits for arrears of rent at the rate recorded in the khatian prepared at the settlement. The tenants contested these suits, but they were decreed at the admitted rate for the years 1315 and 1316, and at the enhanced rate for 1317 F. The tenants thereupon brought the present suit against the landlord for a declaration that the lands in the mauzas, details whereof were given in a schedule attached to the plaint, had been in existence without alteration and change in rental for a long time immemorial and from the time of their ancestors and that the jama recorded in the survey and settlement khatian was an outcome of fraudulent proceedings; that the survey and settlement officers were not entitled to enhance rent at more than two annas per rupee on the former jama; that the decrees as passed against the plaintiffs by the Munsif on account of the year 1317, in the various suits mentioned in para. 8, of the plaint were contrary to law and were unfit to be executed. The declaration sought for in the suit was in respect of 78 different holdings held by 78 sets of tenants and 59 separate decrees against separate sets of tenants. The suit was valued at Rs. 50,000 and the court-fee paid on the plaint was Rs. 20 only, the suit being apparently treated as a suit for two declarations. The suit was dismissed and the tenants plaintiffs filed an appeal to the High Court, and the same amount of court-fee was paid on the memorandum of appeal. The Stamp Reporter submitted

that the Court-fee paid both on the plaint and the memorandum of appeal was insufficient.

Mr. Audh Bihari Choubey for the appellants contended before the taxing officer that the suit was one for two declarations only and as such the court-fee paid was sufficient. The taxing officer not agreeing with the contention of the learned vakil for the appellant referred the case to the taxing Judge. In the course of his order of reference, he observed as follows:

"The declarations asked for are by 78 sets of plaintiffs with regard to 78 separate holdings and 59 separate decrees. That is, there are 78 separate causes of action in respect of the holdings and 59 separate causes of action in respect of the decrees which they meant to get rid of. The plaintiffs could and, as I think should, each have brought separate suits; but because they have not done this they cannot escape payment of the court-fees which are due on the separate causes of action. There are 78 plus 59, i. e., 137 causes of action, each of which carries a court-fee of Rs. 10."

Judgment.—I agree with the learned Registrar for the reasons given by him.
V.S./R.K. *Order accordingly.*

A. I. R. 1919 Patna 480

DAWSON-MILLER, C. J. AND ADAMI, J.

E. Milne—Plaintiff—Appellant.

v.

Jagmohan Gareri and *others*—Defendants—Respondents.

Letters Patent Appeals Nos. 30 to 45 of 1918, Decided on 20th June 1919, from decision of Roe, J.

Provincial Small Causes Court Act (1887), Art. 8—Suit for recovery of murtafa is cognizable by Small Cause Court.

A suit to recover murtafa (a tax or rent leviable in the nature of house-rent) for the occupation of houses is cognizable by a Small Cause Court. [P 481 C 1]

Sushil Madhab Mallik—for Appellant.

A. K. Roy—for Respondents.

Dawson-Miller, C.J.—In this case the plaintiff brought a suit before the Munsif at Arrah claiming from a large number of defendants various sums for what is described as murtafa or house and shop-rent according to the plaint. When the case came before the learned Munsif, the defendants amongst other defences contended that the ordinary Courts had no jurisdiction to try the case because the claim was for a sum under Rs. 500 and therefore the case was properly triable by a Small Cause Court. The question

then arose whether within the meaning of Sch. 2, Art. 8, Small Causes Courts Act, what was really claimed in this suit was house-rent or not, because although the Small Cause Court would have jurisdiction to try cases up to the amount claimed here, still if it was a suit for recovery of rent other than house rent, then the jurisdiction of the Small Cause Court was ousted and the case was properly brought before the Munsif. The Munsif came to the conclusion that he had no jurisdiction to try the case because according to such evidence as was before him, it seemed to him clear that the claim was in fact one for house-rent. His reasons for arriving at that conclusion were that the claim was so described in the plaint and secondly that the plaintiff's own patwari in giving evidence said that the rent was realized on the houses of the tenants and that this applied whether the tenants actually built their own houses or whether they did not. The Munsif, having come to the conclusion that he had no jurisdiction to try the suits, instead of returning the plaints to the plaintiff, went on in the event of his finding on this question being disagreed with by a higher Court, to determine the case on the merits and eventually on the merits he dismissed the suit against all the defendants.

The matter then went on appeal to the Subordinate Judge and he dealt with this question of jurisdiction in a very summary manner. All he said about it was this:

"It is clear that murtafa rent is rent for homestead lands which defendants occupy in plaintiff's zamindari. Such suits are not cognizable by Small Cause Courts, unless there is an officer specially empowered to try suits for homestead rents under Small Cause Court procedure, vide Art. 8, Sch. 6, Small Cause Courts Act. Under the circumstances I hold that the lower Court had jurisdiction to try these suits."

That was all he said about it. Then he deals with the case on the merits and he allows the claim against a number of the defendants, either on the ground that they had not appeared and the plaintiff had made out a prima facie case or on the ground that the survey khatian showed that the plaintiff was entitled to recover this rent, whatever the nature of it might be. In other cases where the survey khatians were not in favour of the plaintiff, he dismissed his claim against some of the defendants.

The plaintiff appealed to this Court and when the matter came before the learned Judge, he came to the conclusion that on the first point raised by the defendants, viz., that of jurisdiction, the Munsif was right and that therefore, neither the Munsif nor the Subordinate Judge had any jurisdiction to try the case. His reasons for arriving at that conclusion were that looking at the plaint and looking at the evidence in the case, because that is all there was to go on, it was quite clear either that what was claimed was in fact house-rent or else some sort of tax leviable by the landlord on the tenants, which was neither house nor land tax but a sort of poll tax or something of that sort which he either lawfully or unlawfully demanded from them. But in the event of an appeal and his decision being overruled on that point, the learned Judge considered the merits and he came to the conclusion on the merits that the plaintiff ought not to succeed.

It seems to me that the learned Judge of this Court was quite right in holding as he did that the Munsif's Court had no jurisdiction to try the case. The claim is framed as one for house-rent, and the evidence in the case seems to show that this is a tax or rent leviable in the nature of house-rent and that it is imposed upon the tenants in respect of the houses which they actually occupy. They are small houses or shops occupying a small plot of land and the tenants no doubt from time to time change and new tenants come in. What exactly were the terms of the agreement between any of the individual tenants in this case and the landlord we have no evidence to show, but the only evidence there is before the Court seems to me clearly to indicate that the tax or rent demanded is either a house rent or, as the learned Judge described it, a tax. In either case the proper Court in which to institute this suit was the Small Cause Court. Therefore we think that this appeal must be dismissed. It is unfortunate that this case should have gone through no less than three Courts before coming here, and it is unfortunate also for the defendants that they have succeeded in all three Courts on the merits, but they themselves raised this question and even if they did not, it seems to me that it would have been impossible if the ques-

tion were raised, to decide otherwise than that the Court had no jurisdiction. Therefore the appeal will be dismissed with costs here and in all the Courts below. This judgment will govern Letters Patent Appeals Nos. 30 to 45 which, although they are separate suits, have all been tried together and are before us now together and have been the subject of the present judgment. The hearing-fee in respect of the whole 16 cases is assessed at double the ordinary amount. The cross-objection is dismissed.

Adami, J.—I agree.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 481

ROE AND COUTTS, JJ.

Ram Anand Kurmi and another—
Petitioners.

v.

*Ram Nagina Pathak and others—Op-
posite Parties.*

Civil Revn. No. 156 of 1918, Decided on 7th January 1919 from a decision of Dist. Judge, Shahabad.

Civil P. C. (1908), S. 115—Order made without jurisdiction—Party not contesting claim in lower Court can apply in revision to set aside order made to his prejudice.

One of several transferees of a holding made an application to set aside an auction sale of the holding held in execution of a rent decree, making other transferees of the holding parties to the proceeding. The latter did not appear and the sale was set aside. The auction-purchaser appealed to the District Judge. In appeal he intimated that he was willing to release the share of the contending transferee, with the result that the sale was confirmed with a modification in favour of the contending transferee. The other transferees applied to the High Court in revision to set aside the order of the District Judge:

Held: (1) that the order of the District Judge being based neither on a compromise between all the parties nor on a consideration of the facts and evidence in the case, was bad and was without jurisdiction; (2) that the applicants, although they did not appear in the lower Courts had a right to apply to the High Court to set aside an order made to their prejudice wholly without jurisdiction. [P 482 C 1]

G. C. Pal—for Petitioners.

Parmeshwar Dayal, Krishna Sahai and Nirsu Narain Singh—for Opposite Parties.

Coutts, J.—This application arises out of certain execution proceedings. The Maharaja of Dumroan obtained a decree against certain persons in execution of which their holding of 6 bighas was sold for Rs. 65. Previous to this sale of the holding there had been a sale of 13 kottas of the holding to one Basudeo Tewari for

Rs. 200, who filed an application to have the sale set aside on the ground of fraud. This application was heard and the sale was set aside. Against this order setting aside the sale the auction-purchaser appealed. During the proceedings in the appellate Court the auction-purchaser filed a petition in which he stated that he was prepared to release the 13 kottas which Basudeo Tewari had purchased, and in consideration of this promise the learned District Judge, after finding that the other respondents to the appeal had no right to challenge the sale, passed the following order:

"Subject to the auction-purchaser's undertaking to respect the encumbrances created by Basdeo Tewari, the appeal will be decreed and the sale will be treated as valid. Basudeo Tewari was justified in contesting the appeal and the appellant must pay his costs."

On the face of it this was a bad order because neither was it an order passed of a compromise between the parties nor was it an order passed after consideration of the facts and evidence in the case. It is therefore an order passed without jurisdiction which should be set aside. The only question is whether the present petitioners are entitled to make the present application to have it set aside. The petitioners are one of them a purchaser of a portion of the holding before the auction sale and the other a mortgagee of a certain portion of the holding. It is admitted that in view of a recent Full Bench decision of this Court the petitioners have an interest entitling them to contest the validity of the sale, but it is argued that as they did not join Basudeo Tewari in the first instance in objecting to the sale, and as they did not enter appearance in the appeal although they were made respondent contention now on louse standi. This contention is in my opinion unsustainable. So long as the order of the first Court was subsisting these petitioners were not affected by the sale and no doubt in the appeal they considered that their interests were safe in the hands of Basudeo Tewari. Basudeo Tewari however apparently compromised the matter with the auction-purchaser and these petitioners' interests thereby became adversely affected. Under these circumstances there is no reason why they should not now make this application. In this view and the order being without jurisdiction I would set aside the order of the learned District

Judge and direct that the appeal be reheard. I would make no order as to costs inasmuch as these petitioners should have appeared at the earlier stages of the proceedings.

Roe, J.—I agree.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 482

ATKINSON AND MANUK, JJ.

Parma Dube and another—Defendants
—Appellants.

v.

Mahadeo Singh and another—Plaintiff
and Defendants—Respondents.

Second Appeal No. 1065 of 1917, Decided on 7th February 1919, from a decision of Dist. Judge, Shahabad, D/- 2nd August 1917.

(a) **Hindu Law—Joint family—Mitakshara—Guardian cannot be appointed of lunatic member of the family in respect of his interest in property.**

A guardian of the property of a lunatic cannot be properly appointed in respect of the lunatic's interest in the property of an undivided Mitakshara family, the reason being that no outsider can be allowed to intermeddle with the property and affairs of a joint Hindu family merely by being appointed the guardian of an incompetent member of that family. [P 483 C 2]

(b) **Hindu Law—Joint family—Father lunatic—Adult son is karta.**

Where the members of a joint Hindu family consist of a lunatic father and an adult son, the son must be presumed to be in fact the karta of the joint family. [P 484 C 1]

(c) **Transfer of Property Act (1882), S. 6(a)—S. 6 (a) has no application to interest of member of Hindu joint family in ancestral property.**

Section 6, Cl. (a), has no application to the case of a member of a joint Hindu family whose interest in the ancestral property is not in the nature of a mere spes successionis but a vested present interest which may be undefined, in the sense that it may vary from day to day, but which is nevertheless something very different from the chance of an interest contemplated by the section. [P 484 C 1]

Parmeshwar Dayal and Jadubans Sahai—for Appellants.

Shivanandan Ray—for Respondents.

Manuk, J.—This appeal arises out of a suit instituted by one Mahadeo Singh now deceased, a lunatic, through his wife and guardian, Mt. Sukha Kuer, against the present appellants as the principal defendants and the lunatic's son. Ganesh Singh, as a pro forma defendant. The suit was one for recovery of theca rent for the year 1322 F. S. and for the Pous kist of 1323 Fasli, on the footing of a lease in favour of the appellants executed on 11th June 1911 by

Mt. Sukha Kuer as guardian of the lunatic and by Ganesh jointly, with respect to certain family property. It is common ground that Mahadeo became a lunatic during the minority of Ganesh, and his wife was thereupon appointed guardian of his person and possibly also of his property. It is also common ground that apart from the son Ganesh there are no other members in the family, which was a joint one, governed by the Mitakshara law. The suit was resisted by the principal defendants, now appellants before us, principally on the ground that by a later document, dated 26th June 1914, Ganesh as karta of the family gave to the defendants a usufructuary mortgage of the same properties for a zarpushgi of Rs. 500, the interest on which was set off against the usufruct. It is contended on behalf of these zarpushgidars that as this document extinguished the previous lease and that as the arrears of rent sued for are of a period subsequent to the date of this zarpushgi mortgage, the suit is not maintainable. The learned Munsif who tried the case decreed the suit with respect to only half of the rent claimed. He held that Ganesh was not the karta of the family at the time when the zarpushgi lease of 1914 was executed, but that Ganesh had a half-share in the property, and that therefore the document bound his half-share only.

The learned District Judge on appeal held also that Ganesh was never the karta of the family and that Ganesh, as an undivided member of the joint Hindu family governed by Mitakshara, could not create a mortgage for this own share without first suing for the partition; he therefore decreed the whole of the claim allowing costs as against the present appellants. There was a cross-appeal by the present appellants with respect to the half-share of the rent that had been decreed, and that appeal was also dismissed by the learned Judge. Since the decision of the learned Judge Mahadeo has died and now it is admitted that Ganesh is the sole proprietor of the property, the subject-matter of both the documents referred to above, and alone contests the appeal to the Court. On behalf of the zarpushgidars it is contended before us that Mt. Sukha Kuer could not have seen properly made a guardian of the property of her lunatic

husband, inasmuch as he was a member of a joint Hindu family. We are of opinion that this contention is well founded. It was laid down by the Privy Council in the case of *Gharib Ullah v. Khalak Singh* (1) that it is now settled by a long series of decisions in India that

"a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family."

Their Lordships of the Privy Council approved of this proposition and expressed their view that a guardian, if appointed, would under these circumstances have nothing to do with the family property. The principle has been extended by the Madras High Court to the case of a guardian (of a lunatic) appointed under the provision of Act 35 of 1858, and we are of opinion that it is impossible to draw any distinction in principle between the two classes of guardians. The reason for this principle is obvious, and it is that no outsider can be allowed to intermeddle with the property and affairs of a joint Hindu family merely by being appointed the guardian of an incompetent member of that family. That being so, we have next to consider who was the proper person to act in this family with respect to transactions affecting the family property. Mr. Shivanandan Rai on behalf of the respondents here admits that there was at the time of the first document no karta, and he also claims that when the second document was executed there was in fact no karta of the family. He urges that to bind the estate it would have been necessary for all the members of the family to join in the document of 1914, even as they had joined in the document of 1911. Now whatever might have been the position if Mahadeo had been alive at present, the fact remains that Ganesh now is the sole representative of the estate, and that in the zarpushgi document of 1914 he held himself out to be the karta of the family and purported to execute the document in that capacity. Nor, indeed is it surprising that Ganesh should in fact have been at that time the karta of this joint Hindu family, whose members consisted of a lunatic father under the guardianship of a parandashin wife and an adult major son, i.e., Ganesh himself. It is reason-

(1) [1903] 25 All. 407=30 I. A. 165=8 Sar. 482 (P.C.).

able to suppose that Ganesh would conduct the business affairs of this family and would be authorized by his mother to look after these affairs and raise money, if and when necessary, for the purposes of the joint family. Otherwise the position of the family would have been impossible, if not desperate.

We hold that the lower Courts were wrong in finding under the circumstances set out above that Ganesh was not the karta of the family when he as karta executed the zarpeshgi mortgage deed in 1914. Now, that being so, and it being conceded that this document extinguished the earlier lease, the suit for arrears of rent accruing under its terms after 1914 was not maintainable by any member of the joint Hindu family. Moreover, as Ganesh admittedly received the consideration money for the mortgage and as he is now the sole proprietor of the family estate, no question of legal necessity for the loan can arise; nor can he be permitted in equity and good conscience to repudiate his own document. It is also argued by the learned vakil for the respondents that S. 6, Cl. (a), T. P. Act, is a sufficient answer to the appellants' contention. We are of opinion however that that section has no application to the case of a member of a joint Hindu family, whose interests in the ancestral property are not in the nature of a mere spes successionis but a vested present interest which may be undefined in the sense that it may vary from day to day, but which is nevertheless something very different from the chance of an interest contemplated by S. 6, Cl. (a), T. P. Act. This question however really does not arise after our finding that Ganesh executed the usufructuary mortgage in his capacity as karta. Under the circumstances the appeal must be decreed and the original suit must stand dismissed. We order that each party should bear its own costs throughout.

Atkinson, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 484

DAS, J.

Jugal Kishore Sah and others—Defendants—Appellants.

v.

Shambhu Nath Pande and another—Plaintiff and Pro forma defendant—Respondents.

Second Appeals Nos. 1299 to 1303 of 1917, Decided on 4th April 1919, from decision of Judicial Commissioner, Manbhum.

Chota Nagpur Tenancy Act (1908), Ss. 26 and 27—Occupancy tenant—Contract to pay enhanced rent is illegal.

The language of S. 27 is very peremptory and leaves no scope whatever for any agreement between the parties. [P 485 C 1]

A kabuliyat executed by an occupancy tenant to pay enhanced rent is illegal and is not binding upon the tenant under S. 27. [P 485 C 1]

Mirtunjay Lal—for Appellants.

Sushil Kumar Mitter—for Respondents.

Judgment.—These analogous appeals come before me from the judgment of the Judicial Commissioner of Manbhum and arise out of suits brought by the respondent against the appellants for recovery of rent on the basis of kabuliyats executed by the tenants in favour of the landlord. It appears that the entire mauza in which these tenants hold land as occupancy tenants, was sold in execution of a rent decree obtained by the zamindar against the mukarraidar and was purchased by Mr. G. P. Cooke. Subsequently Mr. Cooke sold his interest to the plaintiff. The plaintiff's case is that the result of the auction sale was to put an end to all the tenancies as encumbrances affecting the land and that he became entitled to evict the tenants, including the appellants before me, from the land but that he offered to enter into settlements with them on new terms and conditions, which offer was accepted by the tenants. He now brings his suit for recovery of rent on the basis of the kabuliyats alleged to have been voluntarily executed by the tenants in favour of the plaintiff. The tenants contest this suit on two grounds. Firstly, they say that these kabuliyats were procured from them by coercion and undue influence exercised on them by the plaintiff; secondly, they say that having regard to the provisions of Ss. 26 and 27, Chota Nagpur Tenancy Act, the plaintiff is not entitled to receive rent at the rate stipu-

lated in the kabuliyats. The lower appellate Court has come to a conclusion favourable to the plaintiff on both these points.

The tenants appeal, and on their behalf it has been argued before me that these kabuliyats were in fact procured by coercion and undue influence and therefore they are not binding on the tenants. I do not propose to come to a definite finding on this point, because in my opinion the appellants are entitled to succeed on the next point urged on their behalf, namely, having regard to the provisions of Ss. 26 and 27, Chota Nagpur Tenancy Act, the plaintiff is not entitled to recover rent at the stipulated rate. The provisions of Ss. 26 and 27, Chota Nagpur Tenancy Act, are very definite and clear, but it has been argued before me by the learned vakil appearing on behalf of the respondent that at the time when these kabuliyats were executed by the tenants, the law was not perfectly clear, or at any rate doubtful on the question whether the purchaser of a tenure sold for non-payment of rent due to the superior landlord was not by virtue of S. 16, Rent Recovery Act, or entitled to annul the occupancy tenancies on the land as encumbrances affecting the land. His point is that at any rate the position was not free from doubt and difficulty. He had a fair chance of establishing in a Court of law that he was entitled to evict the tenants; the tenants appreciated their own difficulty in the matter and voluntarily executed the kabuliyats. He says that the arrangement amounted to a fresh settlement of land with his tenants. The argument is a subtle one, but in my opinion it does not deserve success. The question was debated in the case of *Bama Charan Gosain v. Ram Kanai Dubey* (1) and it was there pointed out that from the days of 11 Weekly Reporter it has been consistently held that the occupancy tenants are by the express provision of S. 16 protected from eviction. The only one case that has struck a different note is that of *Jogeshwar Muzumdar v. Abed Mohamad Sirkar* (2), but that was a case decided under Regulation 8 of 1890 and not under the Act of 1865. Having considered S. 16, Act 8 of 1865, myself, I agree with the learned

Judges who decided the case of *Bama Charan Gosain v. Ram Kanai Dubey* (1) that the occupancy tenants are so protected and that it has been so held certainly from 1869. That being so at the date of the kabuliyats these tenants were undoubtedly occupancy raiyats and there was undoubtedly a subsisting relationship of landlord and tenant between the plaintiff and them. In my opinion the enhancement of rent could only be under the provisions of Ss. 26 and 27, Chota Nagpur Tenancy Act. The learned Judicial Commissioner relies upon the case of *Bata Mandal v. Maharaja Manindra Chandra Nandi Bahadur* (3) for his conclusion that Ss. 26 and 27, Chota Nagpur Tenancy Act, only apply where there is a real contract for enhancement, and not where there is a bona fide dispute between the parties. The case reported as *Bata Mandal v. Maharaja Manindra Chandra Nandi Bahadur* (3) was decided with reference not to Ss. 26 and 27, Chota Nagpur Tenancy Act, but to S. 29, Ben. Ten. Act, and it is to be noted that the learned Judges who decided that case did so very reluctantly and only because they thought they were compelled to do so having regard to the course of the decisions on the subject. So far as Ss. 26 and 27, Chota Nagpur Tenancy Act, are concerned, we are not embarrassed by a course of decisions, and are at liberty to decide according to the plain meaning of the section. But apart from this consideration, there is in my opinion a difference in principle between S. 29, Ben. Ten. Act, and Ss. 26 and 27, Chota Nagpur Tenancy Act. It is to be noted that the language of S. 27 is very peremptory and, in my opinion, leaves no scope whatever for any agreement between the parties. It is expressed both in the positive and negative form. It says that the rent of an occupancy raiyat whose rent is liable to enhancement may be enhanced only by order of the Deputy Commissioner passed under S. 29, and then in order, as I understand, to emphasize the position, it declares in the negative form that no enhancement of such rent made after the commencement of this Act in any manner other than that referred to in Cl. (a) or Cl. (b), as the case may be, whether by private contract or otherwise, shall for any reason be recog-

(1) [1915] 28 I. C. 374.

(2) [1899] 3 C. W. N. 13.

(3) A. I. R. 1915 Cal. 211=25 I. C. 829.

nized or given effect to in any suit or proceeding in any Court. In my opinion the judgment of the learned Judicial Commissioner is erroneous and I would therefore allow all these appeals with costs here and in the Courts below.

V.S./R.K.

Appeals allowed.

***A. I. R. 1919 Patna 486 (1)**

DAWSON-MILLER, C. J. AND COUTTS, J.

Rash Mohan Lal and another—Plaintiffs—Appellants.

v.

Ram Mohan Lal and others—Defendants—Respondents.

Privy Council Appeal No. 104 of 1918, Decided on 15th May 1919, against judgment of Chapman and Roe, JJ., D/- 8th April 1918.

*** Civil P. C. (1908), S. 110—Value of subject-matter of suit less than Rs. 10,000—Increase in value during pendency in suit is not sufficient to bring case within S. 110.**

The value of the subject-matter of a suit was stated in the plaint to be Rs. 7,950. After decision of the suit and of an appeal by the High Court, an application was made for leave to appeal to His Majesty in Council, on the ground that at the date of the application the value of the property had increased and was now close on Rs. 12,000 :

Held: that the fact that the value of the property had increased since the decision of the appeal would not be sufficient to bring the case within the provisions of S. 110, Civil P. C., which required that the value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards and the value of the subject-matter in dispute on appeal to His Majesty in Council must be the same or upwards.

[P 486 C 2]

*Asghar and Gajendra Prasad Das—*for Appellants.

*Atul Krishna Rai—*for Respondents.

Judgment.—This application must be dismissed. The plaintiffs seek leave to appeal to His Majesty in Council from a decree of this Court dated 8th April 1918, affirming a decision of the Subordinate Judge of Cuttack.

The suit was valued by the plaintiffs in the Court of first instance at a sum of Rs. 7,950. They contend now that the value of the property in respect of which the suit was brought has increased and that its present market value is close upon Rs. 12,000, and we are asked to send the case down to the Subordinate Judge to report upon the amount or value of the subject-matter of the suit. The plaintiffs do not contend that at the time when the suit was instituted the value of the subject-matter of the suit was

more than that stated in the plaint, namely Rs. 7,950. Their only contention is that at the present moment the value is in excess of Rs. 10,000. It seems to us quite clear that even if the petitioners could succeed in proving that the market value of the property in suit has gone up, that would not be sufficient to bring the case within the provisions S. 110, Civil P. C. According to that section two conditions must be complied with before the Court can grant a certificate. The first is that the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards, and the second is that the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards. It is admitted in this case that it cannot be proved, whatever inquiry may take place, that the case comes within the first of these conditions. Therefore it seems quite useless to send the case back to the Subordinate Judge for inquiry and this application must be dismissed with costs. Hearing fee three gold mohurs.

V.S./R.K.

Application dismissed.

A. I. R. 1919 Patna 486 (2)

DAS, J.

Rangu Mandal—Defendant—Appellant.

v.

Chatternath Chowdhury and another—Plaintiffs—Respondents.

Second Appeals Nos. 1393 and 1394 of 1917, Decided on 24th April 1919, from decision of Dist. Judge, Purneah.

Civil P. C. (1908), O. 41, R. 31—Failure to weigh evidence and to come to satisfactory conclusion is error of procedure.

The failure by an appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it, amounts to an error of procedure which vitiates the judgment given by that Court. [P 487 C 2]

*Ram Lal Dutt—*for Appellant.

*Sakti Kanta Bhattacharjee—*for Respondents.

Judgment.—These two appeals arise out of suits brought by the respondents against the appellant for recovery of rent due by the appellant to the respondents for the years 1319 to 1322. The plaintiffs' case is that the defendant is in possession of two holdings for one of which he pays Rs. 17-3-3 as rent and for the other of which he pays Rs. 19-9-6. The defendant says that before the

survey operations he was in possession of three holdings for which he paid Rs. 8, Rs. 9-3-3 and 15 annas 6 pies as annual rent respectively, but that at the time of the survey the first and the second Jamas of R. 8 and Rs. 9-3-3 were amalgamated into one Jama of Rs. 17-3-3 and the third Jama of 15 annas 6 pies was allowed to remain separate. It will be noticed that the defendant admits that he is now in possession of a holding for which Rs. 17-3-3 is payable as rent but that he denies that he is in possession of any holding for which Rs. 19-9-6 is payable as rent. The substantial question which I have to determine is, is the defendant in possession of a holding for which Rs. 19-9-6 is payable as rent? It is clear to me that the case has not been disposed of in a satisfactory manner by either of the Courts below. Indeed the judgment of the lower appellate Court, which is the judgment of the final Court of facts, shows that it never understood the case made by the defendant. It says:

"The defence was that there was only one single Jama of Rs. 19-9-6 and that the Jama of Rs. 17-3-3 is included in the Jama of Rs. 19-9-6."

That was not the defence at all. The defence was that there were two Jamas one of Rs. 17-3-3 and the other of 15 annas 6 pies, as para. 2 of the written statement filed in Rent Suit No. 1500 of 1915 clearly shows. The defendant never made the case that he was in possession of a single Jama and I am of opinion that his inability to appreciate the defendant's case has in this instance led to a failure of justice. It appears on a reference to the Record of Rights Ex. B that the two Jamas of Rs. 9-3-3 and Rs. 8 were first of all amalgamated into one Jama of Rs. 17-3-3 and then the three Jamas of Rs. 9-3-3, Rs. 8 and 15 annas 6 pies were again amalgamated into a Jama of Rs. 18-2-9, which again is shown in the Record of Rights itself as enhanced to Rs. 19-9-6 as per order of Court in Suit No. 11 of 1890-91. The defendant says that there is an obvious mistake in the preparation of the Record of Rights because he was only in possession of three Jamas and they could not be amalgamated twice. It seems to me that the defendant's contention must prevail unless it can be shown that the defendant was in possession of two Jamas of Rs. 8, two Jamas of Rs. 9-3-3 and one

Jama of 15 annas 6 pies. The onus is undoubtedly on the defendant to show that he was in possession of three Jamas and not of five Jamas, but he claims to have proved conclusively that he was in fact in possession of three Jamas and not of five Jamas. Now the defendant's case may be true or false, but at any rate he was entitled to ask the Court to consider his case. It seems to me that the lower appellate Court never applied its mind to the evidence on the record. It does indeed say that there are no sufficient materials to rebut the presumption of the correctness of the Record of Rights, but as Mullick and Atkinson, JJ., said in the case of *Mubarak Hussain v. Syed Shah Hamid Hussain* (1):

"A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain state of facts, is not a sufficient judgment within the meaning of the law, and we are bound to interfere if we feel that there may have been a miscarriage of justice by the Court's failure to weigh all the evidence before it."

A bare perusal of the Record of Rights throws grave suspicion on the case made by the plaintiff and in my opinion the lower appellate Court should have dealt with the matter. I may appropriate the words of Jenkins, C. J., in the case of *Pertap Narain Singh v. Maigh Lall Singh* (2) and cited by Mullick J. in the case to which I have just referred and say that the matter was deserving of a far fuller discussion than the learned District Judge has bestowed upon it. In my opinion there has been an error of procedure by the failure of the lower appellate Court to weigh all the evidence and to come to a satisfactory conclusion on the evidence before it. I would therefore remand the cases to the lower appellate Court in order that there may be a proper trial of the issues raised. It is necessary to mention another matter which has been brought to my notice by Mr. Ram Lal Dutt. It appears that the appellant asked the lower appellate Court to take in evidence certain papers which according to the appellant were in fact produced by the plaintiffs respondents before the Court of first instance. The learned District Judge does not seem to have dealt with that application. In dealing with this case on remand, I direct that the lower appellate Court do

(1) [1917] 38 I. C. 509.

(2) [1909] 36 Cal. 927=2 I. C. 656.

dispose of that application according to law. It must be distinctly understood that the discretion of the lower appellate Court in the disposal of that application remains wholly unfettered. All that I say and direct is that it should exercise his discretion in the matter. In the result I allow the appeals and set aside the decrees of the lower appellate Court and remand both the cases to the lower appellate Court for disposal according to law. Costs will abide the result.

V.S./R.K.

*Appeals allowed.***A. I. R 1919 Patna 488**

COUTTS AND ADAMI, JJ.

Lalu Pandit and another—Petitioner.
v.*Emperor—Opposite Party.*

Criminal Revn. No. 171 of 1919, Decided on 3rd July 1919, against order of Sess. Judge, Muzafferpur, D/- 27th May 1919.

Opium Act (1 of 1898), Ss. 9 (c) (e) and 14—Mere illegalities in mode of search do not vitiate proceedings.

Mere illegality in the exercise of the right of search under the Opium Act is not in itself a sufficient ground for setting aside a conviction under the Act. [P 489 C 1]

*S. P. Varma—*for Petitioners.*Sultan Ahmad—*for the Crown.

Facts.—The petitioners in this application in criminal revision were convicted of offences under S. 9, sub-Ss. (c) and (e), Opium Act, 1878. The learned Deputy Magistrate of Motihari, Mr. Ritchie, convicted both the accused and sentenced them to one year's rigorous imprisonment coupled with a fine of Rs. 200 each. The order of Mr. Ritchie was dated 22nd March 1919. The accused appealed and the appeal came before the learned Sessions Judge of Muzafferpur. The learned Sessions Judge affirmed the conviction of both the accused and imposed a sentence of three months' rigorous imprisonment upon each of the accused and a fine of Rs. 200 upon the petitioner *Lalu Pandit* and a fine of Rs. 25 upon the petitioner *Ali Raza*.

When *Jawala Prasad, J.*, and myself were sitting as the Criminal Bench of this Court, we allowed notice to issue on the petitioners' petition herein for the purpose of showing cause why the order of the learned Sessions Judge in appeal should not be set aside, and the ground on which we were pleased to allow notice to issue was because it was stated to us

that the provisions of S. 14, Opium Act, 1878 had not been complied with by the authorities charged with the duty of enforcing the provisions of the Opium Act, and that the search contemplated by S. 14, Opium Act, had not been duly and regularly made in accordance with the requirements of the Act, inasmuch as the search that was made in this particular case was effected at hours other than between sunrise and sunset; and consequently we were of opinion having regard to the ruling of my learned brother *Das, J.*, in Criminal Revision No. 120 of 1919 [*Lachmi Narain v. Emperor* (1)] that notice should issue for the purpose of testing the validity of the conviction of the accused.

Had it not been for the decision of my learned brother *Das, J.*, I would have little hesitation in disposing of this case myself but out of respect for the authority which I entertain for the opinion of my brother *Das, J.*, I think it desirable that this case should be disposed of by a Division Bench of this Court. *Das, J.*, laid down in the criminal revision application to which I have referred, that if the authorities charged with administration of the Opium Act are guilty of any illegality in exercise of the right of search conferred upon them by the provisions of S. 14, Opium Act, that such illegality per se renders it impossible, as a proposition of law, to bring an offender against the provisions of the Opium Act to justice in respect of a crime committed and substantiated by clear and convincing evidence aliunde, and that in such case, and in such event, the accused must be acquitted of the established crime which he has committed. I cannot subscribe to the expression of this dictum, as a proposition of law, laid down by my learned brother and it seems to me to be in conflict with general legal principles and with the established current of recent authority in this country.

The rulings reported as *Emperor v. Allahdad Khan* (2); *Emperor v. Madho Dhobi* (3) and *Emperor v. Ravalu Kasi-gadu* (4) laid to the conclusion that mere illegality committed in the exercise of a right of search does not of necessity destroy the fact of criminality, if a crime be

(1) [1920] 53 I. C. 150.

(2) [1913] 35 All. 358=19 I. C. 332.

(3) [1904] 31 Cal. 557.

(4) [1903] 26 Mad. 124.

proved otherwise to have been committed by a person against whom a crime is charged under the Opium Act or any kindred Act. If the right of search be illegally performed and executed, this may constitute a civil injury for which damages may be recovered but it cannot in my opinion wholly destroy or render nugatory the Act of fact or criminality if a crime be otherwise proved to have been committed. In my opinion it is therefore desirable that the law should be conclusively decided and settled on this point in this Province, and consequently at the wish of the parties I transfer this case to be decided by the appropriate Bench of this Court.

Coutts, J.—This is an application in revision by two persons Lālu Pandit and Ali Raza, who have been convicted of offences under S. 9, sub-Ss. (c) and (e), Opium Act, (1 of 1878), and sentenced respectively to three months' rigorous imprisonment and a fine of Rs. 200, or in default one month's further rigorous imprisonment and three months' rigorous imprisonment and a fine of Rs. 25, or in default two weeks' rigorous imprisonment.

The only point which is urged before us is that the conviction is illegal because the provisions of S. 14, Opium Act have not been complied with in this case, and reliance is placed upon an expression of opinion by Das, J., in *Lackmi Narain v. Emperor* (1). On examining this judgment however it appears that this is not the basis of Das, J.'s decision and the decisions of other High Courts in India appear to be against the contention of the learned counsel for the petitioners. The matter has been fully considered in *Emperor v. Allahdad Khan* (2); *Emperor v. Madho Dhobi* (3); *Emperor v. Ravalu Kesigadu* (4) and *Emperor v. Vinayak Damodar Savarkar* (5), and these decisions are clear authority for the view that mere illegality in the exercise of the right of search is not in itself sufficient ground for setting aside a conviction. We have been asked to consider the question of sentence. In my opinion the sentence in neither case is excessive. I would therefore reject this application.

Adami, J.—I agree.

V.S./R.K. *Application rejected.*

A. I. R. 1919 Patna 489

ROE AND COUTTS, JJ.

Sahaj Narayansahi and others—Appellants.

v.

Wajid Hussain and another—Respondents.

First Appeal No. 108 of 1918, Decided on 4th December 1918, from decision of Dist. Judge, Muzafferpore, D/- 2nd March 1918.

Hindu Law — Debts — Son's liability—Father insolvent—Son's share is not liable to be sold to pay father's debt.

Where a Hindu father is adjudicated an insolvent, his sons' shares in the joint family property are not liable to be sold to pay his debts.

[P 489 C 2]

Tribhuban Nath Sahai—for Appellants.

Judgment.—In this case the question in issue is whether the receiver had power to sell more than the estate of an insolvent whose property was in his hands under an adjudication in bankruptcy. The objectors are the two sons of the insolvent and they urge that their shares of the house should be excluded from the sale. The learned Judge accepted the receiver's view on this point that the father being a bankrupt and civilly dead, the sons were bound to pay his debts, and that therefore the sons' shares in the house might be sold along with that of the insolvent's. If we accept the proposition of the receiver that the father is civilly dead, then the sons have succeeded by civil survivorship to the whole of the property now in the hands of the receiver. We are of opinion that the receiver not being in any way connected with the estate of the two sons is precluded from dealing in any manner with the property belonging to the two sons. We therefore direct that the sale to be effected by the receiver be limited to the share of the insolvent in the estate.

There is no appearance on the other side. The appeal is allowed and there will be no order as to costs.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 490

ATKINSON AND JWALA PRASAD, JJ.

Shiv Dutt Ray—Petitioner.

v.

Satish Chandra Ghose — Opposite Party.

Criminal Ref. No. 27 of 1919, Decided on 29th May 1919, made under S. 438, Criminal P. C., by Judl. Commr., Chota Nagpur, D/- 23rd April 1919.

Bengal Municipal Act (3 B. C. of 1884), Ss. 273 and 241—Building below plinth level—No evidence to show what kind of building accused was going to construct or that building when complete would contravene rules—No steps taken to enforce submission of plan—Accused cannot be convicted under S. 273 for having infringed Cls. 1 and 2, R. 13 of Building Regulation of Giridih Municipality.

Accused was convicted under S. 273, Bengal Municipal Act for having infringed Cls. 1 and 2, R. 13 of the Building Regulations of the Giridih Municipality made under S. 241 of the Act. The evidence for the prosecution showed that the accused had only laid the foundation a few feet below the ground level, the brickwork of which had not even reached the plinth level, and there was no evidence to show what kind of building the accused was going to construct, and whether the main building when completed would contravene the clauses of the rule for infringing which he had been convicted, nor had the Municipality taken steps to enforce the submission of a plan.

Held : that the conviction could not be maintained, because there was in fact no building in existence and it was not known whether and where the building would be erected.

[P 491 C 2]

Yunus—for Petitioner.*Manohar Lal*, Assistant Govt. Advocate—for Opposite Party.

Jwala Prasad, J.—This is a reference by the Judicial Commissioner of Chota Nagpur under S. 438, Criminal P. C., recommending that the conviction of the accused under S. 273, Bengal Municipal Act, 3 of 1884, by the Deputy Magistrate of Giridih by his judgment, dated 10th February 1919, be set aside. The reference is opposed by the learned Assistant Government Advocate.

Mr. Yunus appears in support of the reference. The principal ground upon which the recommendation has been made by the learned Judicial Commissioner is that the place where the building in question is alleged to have been created by the accused is situate in a village called Pachamba adjoining the Giridih Municipality, to which the Building Regulations made by the Municipality of Giridih under S. 241, Bengal Municipal Act, and sanctioned by the

local Government under Cl. 2 the section do not apply. This ground does not commend itself to us. The Municipality of Giridih was created some time in the year 1902 and thereupon the Bengal Municipal Act, 3 of 1884, applied to and had its effect in the area declared to be within the Giridih Municipality by virtue of S. 8 of the Act.

Under S. 220 of the Act the provisions of Part 6 only apply to a Municipality when it is expressly extended thereto by the local Government in the manner provided by the succeeding sections. In November 1902 some time after the creation of the Giridih Municipality, Part 6 of the Act was extended to the Municipality by Notification No. 2703 (M). This Part 6 deals amongst other matters with rules relating to the erection and re-erection of buildings within a municipality. S. 241 in that part provides for rules to be made by Commissioners at a meeting to regulate the erection of houses, not being huts, within the municipality in respect of all or any of the matters enumerated therein. For the first time certain rules under this section were framed by the Giridih Municipality in the year 1918, which received the sanction of the local Government under sub-S. 2 of the section on 20th May 1918. Two days later that is on 22nd May 1918, Pachamba was included within the Giridih Municipality by Notification No. 6867 (M) made and published under sub-S. 2, S. 9 of the Act. From the date of the aforesaid notification the area included within what is called Pachamba village became part of the Giridih Municipality, and by virtue of S. 9, Cl. (c), read with S. 7, Bengal Municipal Act applied in its entirety and with full force to the added area Pachamba from the said date. No doubt the Commissioners at a meeting are empowered to recommend to Government for excluding from a municipality any local area comprised therein or to withdraw any municipality, from the operation of the Act; but so long as this is not done, all the provisions of the entire Act in force in a municipality, at the time when its area is extended, apply to the newly added area. It has already been shown that Part 6 as well as the Building Regulations framed by the Giridih Municipality and sanctioned by the local Government under S. 241 of the

said part were in full force two days before Pachamba was included within the Giridih Municipality and hence they would apply to the added area Pachamba within the ambit of which the site on which the accused is said to have commenced the erection of the building in question is situate. Under Cl. (3) of the section, the building rules and regulations acquired the force of law from 20th May 1918, when they received the sanction of the local Government. The accused was amenable to and would have been liable for any contravention of the said rules in erecting the building in question. Had the reference rested solely upon the ground stated by the Judicial Commissioner, that Part. 6 or S. 241 did not apply to added the area Pachamba, we would have had no hesitation in rejecting it and upholding the conviction of the accused by the Deputy Magistrate.

It appears however that the accused committed no offence at all under S. 241 of the Act. The Magistrate has convicted him under R. 13, Cls. 1 and 2 of the Building Regulations published in the Bihar and Orissa Gazette, dated 20th May 1918.

Under Cl. 1 of that rule no building is permitted to be erected within two feet of a public road, lane or drain. Under Cl. 2 the distance between the perpendicular from the eaves of a house to the nearest boundary of the holding on which such house has been or is about to be erected must be three feet and such place must be kept free from all obstructions.

None of the Cls. 1 and 2, R. 13 apply to the present case, as there is nothing to show that the accused in any way contravened the requirements of these clauses, inasmuch as the building has not been constructed and there is no building in existence. The evidence on behalf of the prosecution shows that the accused had only laid the foundation a few feet below the ground level, the brick-work of which had not even reached the plinth level. There is nothing to show on behalf of the prosecution what kind of building the accused was going to construct and whether the main building would be two feet from the public road, or where the eaves of his house when complete would be situate, or whether a perpendicular from the eaves of that

house would be situate within or beyond the prescribed limit of three feet from the road. There is no building at all at present in existence, nor is it known whether and where the actual building would be. It might be that the accused would only construct a chotera or plinth without any structure upon it. The municipality did not take steps to enforce the submission of a plan by the accused in order to see whether the proposed building would contravene the provisions of Part 6 or any of the rules and regulations framed under S. 241. The prosecution was perhaps started a little too early and without any regard to the provisions of Part 6 of the Act. The accused had no right to erect any building without having obtained sanction from the municipality and without first having submitted a plan of the proposed house to the municipality and if the municipality had taken proper steps under the Act, there would have been a possibility of having from the accused a plan of the house and to know exactly whether the accused was going to contravene the provisions of the regulations in the construction of his house. As the matter stands at present, the accused cannot be convicted. We have no doubt declared that Pachamba, where the site of the present proposed building is situate, is within the municipality and is governed by Part 6 and the Building Regulations framed under S. 241 of the Act, so that if the accused in future contravenes the provisions of the said regulations or the Act in any way by building any house on the site in question or otherwise, he will be amenable to law.

The recommendation of the Judicial Commissioner is accepted and the accused is acquitted. The fine, if already realized must be refunded to the accused.

Atkinson, J.—I agree.

V.S./R.K.

Accused acquitted.

A. I. R. 1919 Patna 491

MULLICK AND JWALA PRASAD, JJ.

Kesho Prasad Singh — Defendant —
Petitioner.

v.

Shiva Saran Lal — Plaintiff — Opposite
Party.

Civil Revn. No. 79 of 1919, Decided
on 7th April 1919, from order of Sub-
Judge, Shahabad.

Civil P. C. (1908), S. 10—Matters in dispute in both suits substantially same—Difference in relief claimed does not enable parties to continue litigation.

In order to attract the operation of S. 10, Civil P. C., it is necessary that every matter in dispute should be directly and substantially in issue in the two suits. [P 493 C 1]

Where however the matters in dispute in both the suits are substantially the same, the mere fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the earlier suit would not operate to enable the parties to continue the litigation. [P 492 C 2]

P. K. Sen and Nirsu Narain Sinha—for Petitioner.

S. Sinha, Sailendra N. Palit, G. D. Singh, Raghunath Singh, Santa Prasad and Sambhu Saran—for Opposite Party.

Mullick, J.—This matter arises out of a suit brought by Babu Shiva Saran Lal against the Maharaja of Dumraon for arrears of pension for the period August 1912 to August 1918. The plaintiff alleges that the pension is due upon an ekrarnama executed in his favour by the late Maharani of Dumraon. It appears that another suit claiming pension for an earlier period was decided in the trial Court against the plaintiff but was decreed in his favour on appeal in the High Court. In this suit the present Maharaja of Dumraon repudiated his liability to pay the pension on various grounds. But it was held in the High Court that the liability existed and could be enforced against the property of the Maharani which was in the hands of the Maharaja. Against the judgment and decree of the High Court an appeal is now pending before their Lordships of the Privy Council.

In the present suit it does not appear that any issues have been framed, but an application was made before the trial Court asking that the provisions of S. 10, Civil P. C. 1908, should be put in force and that the Court should not proceed with the trial of the suit till the judgment of their Lordships of the Privy Council is delivered in the appeal pending before them. The Subordinate Judge dismissed the application before him on two grounds. The first ground was that the application was premature inasmuch as it could not be said that the trial could commence before any issues were framed and that the proper stage for making an application under S. 10, Civil P. C., was after the defendants had disclosed their defence and issues had been

framed for trial. The second and more important ground upon which the learned Subordinate Judge proceeded was that S. 10 was not applicable, as the claim in the present case related to a period subsequent to the claim in the former case, and the learned Subordinate Judge relied upon the case of *Bepin Behary Mozumdar v. Jogendra Chandra Ghosh* (1). In my opinion the decision of the learned Subordinate Judge was correct. It is conceded by the learned counsel who appears on behalf of the petitioner that under the provisions of the Code of 1882 unless the same relief had been claimed in the present suit, the Court could not have refused to try it, but he contends that the law has been changed. In this connexion it is not necessary to consider the effect of all the changes in S. 10 as compared with the corresponding section in the Code of 1882; for our purpose it will be sufficient to consider only the effect of the omission of the words "for the same relief" in the present Code.

In the case of *Balkishan v. Kishan Lal* (2) the decision turned upon the words "for the same relief" and the Court was obliged to hold that unless the reliefs were the same, it could not refuse to try the suit even though the matter in issue might be directly and substantially the same. *Balkishan's* case (2) was one relating to malikana for a period subsequent to that covered by a previous suit which was under appeal and it is contended before us that the present Code has expressly omitted the words "for the same relief" in order to overrule the view previously held and to enable the Court to stay the trial of a subsequent suit if the right or title to relief is under adjudication in a previously instituted suit. In my opinion, the omission of the words "for the same relief" does not necessarily indicate that this was the intention of the legislature. What the section does intend is that if all the matters in dispute are substantially the same, then the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation. This was the view taken by their Lordships of the Calcutta High Court in *Bepin Behary's* case (1) above cited.

(1) [1916] 36 I. C. 641.

(2) [1889] 11 All. 148=(1889) A. W. N. 42.

That was a case for rent for a period subsequent to the period which was the subject-matter of a previous suit under appeal. Their Lordships of the Calcutta Court held that although the question of title was raised in both suits and decided in the first suit, it was not sufficient to attract the operation of S. 10. In order to attract the operation of S. 10 it was necessary that every matter in dispute should be directly and substantially in issue in the two suits. It is true that in the concluding portion of the judgment there is a passage relating to the decision of an issue which was left open in the suit. But that passage, in my opinion, does not affect the main ground on which the learned Judges declined to apply S. 10.

The learned author Mr. Mulla in the last edition of his work on the Civil Procedure Code does give an illustration in the notes which would seem to assist the learned counsel for the petitioner. But in my opinion it is not supported by any judicial authority, and is inconsistent with the judgment of their Lordships of the Calcutta High Court. In my opinion the learned Subordinate Judge was right in dismissing the application before him. In the view we take it is not necessary to express any opinion on his first ground but if it were necessary to decide the point, my inclination would be to agree with the Subordinate Judge. The application is dismissed with costs. Hearing fee three gold mohurs.

Jwala Prasad, J. — I agree to the order proposed.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 493

DAS, J.

Bashir Ali and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 15 of 1919, Decided on 7th May 1919, to transfer a case from the file of Sub-Divl. Officer, Araria.

(a) Criminal P. C. (1898), S. 526—**Error of judgment in admitting evidence is no ground.**

The mere fact that a trial Court has committed an error of judgment in admitting evidence, is no ground for transferring a case from such Court.

[P 494 C 1]

(b) Criminal P. C. (1898), S. 526—**Refusal to supply accused with copies of confidential documents does not apprehend any bias.**

It cannot be said that the trial Court entertains any bias against the accused, or that the accused should reasonably apprehend that there is such bias, if when addressed by that Court, the District Magistrate refuses to produce papers called for by the defence on the ground that some are missing and that the rest are confidential.

[P 494 C 1]

Athar Husain—for Petitioners.

Sultan Ahmad—for the Crown.

Judgment.—This is an application for transfer of a case from the file of the Sub-divisional Magistrate of Araria to the file of some other Magistrate subordinate to the District Magistrate of Purnea. Having given my most anxious consideration to the able arguments advanced by Mr. Athar Husain on behalf of the petitioners, I have come to the conclusion that no case has been made out for a transfer. It appears that certain villagers sent a petition to one Mr. Duff complaining that the petitioners were in the habit of taking illegal gratification in connexion with their official duty. Mr. Duff appears to have forwarded the petition to the subdivisional officer. Other petitioners to the same effect were sent to the Postmaster-General and Director General of Post Offices. All these petitions appear to have found their way to the District Magistrate. The subdivisional officer himself made an inquiry and sent his report together with the petition forwarded by Mr. Duff to him to the District Magistrate. Upon all these informations received by the District Magistrate of Purnea, he directed the trial of the petitioners in the Court of the Subdivisional Officer of Araria under S. 161, I. P. C., or in the alternative under S. 409, I. P. C.

The first point taken on behalf of the petitioners is that though they have been put on trial in respect of three specific items, the trial Court has admitted evidence of similar but unconnected instances of alleged offences on behalf of the prosecution in spite of the petitioners' protest. Mr. Athar Husain says that the petitioners have been seriously prejudiced by the reception of this inadmissible evidence, but he very fairly and properly admits that he cannot show that in admitting the evidence, the learned Magistrate was unfair or partial in any way. It is a problem of some nicety whether evidence of similar but unconnected

instances is admissible in a case where the petitioners have been put on trial in respect of three items only, but I do not think that I should fetter the judgment of the trial Court in any manner, specially as it is not suggested that in this matter the Court has been in any way unfair to the petitioners. The Court may have committed an error of judgment in admitting the mass of evidence, but an error of judgment is no ground for a transfer.

The next point urged is that the Court has consistently refused to give the petitioners informations relating to their alleged offence. The complaint is that the evidence recorded by the subdivisional officer and the Criminal Investigation Department and their reports have not been produced in the case. It appears that the Court did write a letter to the District Magistrate asking him if he would produce the papers called for by the defence. The reply of the District Magistrate was to the effect that the evidence was missing and the reports were confidential. This may be true or false, but it does not show that the Court has any bias against the petitioners or that there should be a reasonable apprehension in the mind of the petitioners that there is such bias. I express no opinion on the question whether the petitioners are entitled to the copies of such reports. If they are so entitled, the failure to furnish them with copies of such reports would undoubtedly affect their conviction, if ultimately they are convicted, but they do not affect the present application. One or two other small points have been argued, but in my opinion they are not material for the purpose of this application. I would reject this application.

V.S./R.K.

*Application rejected.***A. I. R. 1919 Patna 494**

COUTTS, J.

Satdeo Narain—Appellant.

v.

Ramayan Tiwari—Respondent.

First Appeal No. 59 of 1919, Decided on 26th June 1919.

Court-fees Act (7 of 1870), Sch. 1, Art. 1—Object of cross-objection is declaration for setting aside mortgage—Ad valorem court-fee on mortgage is payable.

Where the object of a cross-objection is to have a declaration in respect of a mortgage set aside, the proper value of the cross-objection, for the

purpose of court-fees, is the value of the mortgage. [P 494 C 2]

*Susil Madhab Mullick, Jitendra Nath Sen Gupta and Narendra Nath Sen—*for Appellant.

*Rajendra Prasad, Sambhu Saran and Nirsu Narayan Sinha—*for Respondent.

Judgment.—This is a reference by the taxing officer. A Hindu widow mortgaged two properties. A suit was brought by the mortgagee who obtained a decree and in execution purchased the mortgaged properties. We are in this case concerned with only one of these properties, which was purchased for Rs. 826. After the auction sale the decree-holder auction-purchaser sold this property to one Baldeo Sahai, who in his turn mortgaged it to Sri Krishun Sahu, Sitaram Sahu and Durga Prasad (defendants-respondents 3, 4 and 5). The present suit was then instituted by the presumptive reversioners for possession of the property and also for a declaration that the mortgage by the widow and all subsequent transactions were invalid. The prayer for possession has been disallowed in the Court of first instance, the only relief granted being a declaration that the mortgage by the widow was not binding on the plaintiffs. Against this decree the plaintiffs have appealed and a cross-objection has been filed by the defendants-respondents 3, 4 and 5 in regard to the declaration. It is with the court-fee to be paid on the cross objection that we are concerned, and the point for consideration is whether the value of the cross-objection should be the value of the mortgage in regard to which the declaration was obtained, or whether it should be the value of the cross-objectors' mortgage which was for a sum very much greater than the mortgage by the widow. It is true that if the declaration is set aside, the cross-objectors may be benefited to a much greater extent than the value of the declaration, but this is not a matter with which we are concerned. All that is asked for is that the declaration in regard to the widow's mortgage should be set aside and the value of this mortgage, in my opinion, is the proper value of the cross-objection.

V.S./R.K.

Order accordingly.

A. I. R. 1919 Patna 495

CHAMIER, C. J. AND SHARFUDDIN, J.

Narain Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 197 of 1917, Decided on 11th June 1917, against order of Judicial Commissioner, Hazaribagh, D/- 22nd April 1917.

(a) Criminal P. C. (1898), S. 202—Complaint against police officer of having committed cognizable offence—Magistrate should hold immediate inquiry and should proceed to spot without delay.

Whenever such a course is possible, upon a complaint being made against a police officer of the rank of a Sub-Inspector or of a higher rank charging him with having committed a cognizable offence, the Magistrate should hold an immediate local inquiry himself or direct that a local inquiry be made by a Magistrate of the First Class and the Magistrate should proceed to the spot without delay. [P 495 C 2]

(b) Criminal P. C. (1898), Ss. 476 and 537—Complaint against Police Sub-Inspector for extortion—Magistrate dismissing complaint and directing prosecution of complainant—Procedure is regular and quite legal.

Petitioner brought a charge of extortion against a Sub-Inspector of Police. The Magistrate recorded the complaint and held a local inquiry in which he examined nine witnesses for the prosecution and three for the accused. As a result of the inquiry he dismissed the complaint as false and directed that the complainant be prosecuted:

Held: that the procedure adopted by the Magistrate was quite regular and legal. [P 495 C 2]

Manuk—for Petitioner.

Manohar Lal, Asst. Govt. Advocate—for the Crown.

Chamier, C. J.—The applicant Narain Singh has been convicted of having brought a false charge against Nisar Hossein, Sub-Inspector of Hunterganj, in the Court of the Subdivisional Officer of Chatra. The charge was that on 7th August 1916, he saw some cattle grazing in his field in Hunterganj and was taking them to the pound when Nisar Hossain to whom the cattle belonged appeared and abused him, had him arrested and handcuffed, and kept him in the police station till he paid Rs. 10. The subdivisional officer recorded the complaint and then said that he would hold an inquiry at Hunterganj on 15th August. The inquiry was held, nine witnesses being produced by the applicant and three by the Sub-Inspector. Two more witnesses were examined at Chatra on the 17th and on the 18th the subdivisional officer recorded that in his opinion the charge was false. He dismissed the complaint and ordered the

applicant to be prosecuted. The case was made over to a Deputy Magistrate at Hazaribagh and the applicant was convicted and sentenced to six months' rigorous imprisonment.

The first point taken was that the procedure adopted by the subdivisional officer was irregular. As to this it is sufficient to say that the procedure adopted was strictly in accordance with the Code and with the standing orders which are to the effect that whenever such a course is possible, upon a complaint being made against a police officer of the rank of a Sub-Inspector or of a higher rank charging him with having committed a cognizable offence, the Magistrate should hold an immediate local inquiry himself or direct that a local inquiry be made by a Magistrate of the First Class and that the Magistrate should proceed to the spot without delay. These standing orders cannot of course override the law as laid down in the Code of Criminal Procedure. They do not conflict with the Code. They are merely instructions issued to Magistrates for their guidance and are conceived as much in the interest of the public as of the police. It was contended that a Magistrate holding an inquiry under S. 202, Criminal P. C., is not entitled to record evidence in a formal manner, but should hold an informal inquiry and pass orders on the strength of any information that he may be able to pick up. If the Magistrate had proceeded in such a fashion, it would certainly have been contended that his procedure was not fair to the applicant. The applicant himself produced nine witnesses before the Magistrate and cannot complain of the Magistrate having recorded their statements. The order passed by the subdivisional officer for the prosecution of the appellant was neither illegal nor irregular, and no objection to it seems to have been taken in either of the Courts below.

It is no doubt true that the Magistrate who tried the case initiated by the order under S. 476 of the Code wrongly admitted in evidence two entries in a station diary and used against the applicant the fact that he produced some palpably false evidence at the preliminary inquiry. But the Sessions Judge has put aside the evidence which was inadmissible. He has convicted the applicant mainly upon evidence, accepted both by him and by

the trying Magistrate, that on the day of the alleged occurrence the applicant was not in Hunterganj at all. I have examined the evidence and in my opinion the conclusion arrived at by the Courts below is correct. I am satisfied that the applicant was rightly convicted. I would dismiss this application

Sharfuddin, J.—I agree.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 496

MULLICK AND JWALA PRASAD, JJ.

Sarjug Singh and another—Defendants 1 and 2—Appellants.

v.

Jagmohan Singh and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 472 of 1918, Decided on 14th April 1919, from decision of Sub-Judge, Saran.

(a) **Mahomedan Law—Pre-emption—Joint liability to pay revenue does not cease until partition of share.**

Where the liability to pay Government revenue is joint, the joint liability, for purposes of pre-emption, does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities. [P 497 C 1]

(b) **Mahomedan Law—Pre-emption—Talab-i-istishhad explained.**

Under the Mahomedan Law not only is it necessary that the talab-i-istishhad should be made in the presence of witnesses, but that they should be asked to bear testimony that the demand has been duly made. [P 497 C 1]

Hasan Imam, Fakhur-ud-din and Panchanan Banerji—for Appellants.

S. Sinha, Rajendra Prasad, Ram Prasad and Tribhubannath—for Respondents.

Mullick, J.—The plaintiff, in exercise of his right of pre-emption, claims to purchase from defendants 3 and 4 a two-anna share in mauza Bazidpore which these defendants have sold by kabala to defendants 1 and 2. It is admitted that the mauza bears Tauzi No. 780 and that the plaintiff is the owner of a two annas share in it. In the survey and settlement proceedings it was found that the tauzi covered an area of 101 bighas 11 roods and that it has been divided into five shares which have been entered in five khewats numbered 3/1 to 3/5. The plaintiff's interest has been recorded under Khewat No. 3/2 while that of defendants 3 and 4 has been entered in Khewat No. 3/5. An area of 4 bighas odd has been retained in his joint possession of all the cosharers of the mauza and the question is whether, in these circum-

stances, the right of pre-emption exists. The Munsif found on a careful examination of all the acts that the plaintiff had separated his share so completely from that of defendants 3 and 4 that he could not be allowed to pre-empt, and he relied upon a number of authorities in the High Court of Allahabad of which the case of *Munna Lal v. Hajira Jan* (1), is an example.

These authorities however all deal with perfect and imperfect partitions with special laws in the United Provinces and are not of any assistance for the purposes of the case now before us. The general principle that after a perfect partition has been made by the Revenue Authorities, the right of pre-emption no longer exists between the former cosharers is one which does not apply to this case. Here, the liability to pay Government revenue is still joint and a portion of the estate consisting of roads, nullas and watercourses has not yet been partitioned. The question is, whether to such a case as this the principles laid down by their Lordships of the Privy Council in *Jadu Lal Sahu v. Janki Koer* (2) apply. The Subordinate Judge, disagreeing with the Munsif considers that they do. On the other hand, the learned vakil for the defendants appellants before us relies upon *Byjnath Singh v. Dooly Mahtoon* (3). In that case the liability to pay Government revenue was still joint but the plaintiff had divided off his own share by regular metes and bounds and made himself in every respect independent of his co-parceners so far as it was in his power to do so. This case was cited in argument before their Lordships of the Privy Council and it was urged that this joint liability does not constitute the co-parcenary contemplated by the Mahomedan Law. Their Lordships did not accept this submission and held that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue Authorities. In my opinion the learned Subordinate Judge was right in holding that the case under consideration was covered by this decision.

The next point that arises is as to the performance of the demands necessary to

(1) [1910] 33 All. 28=7 I. C. 404.

(2) [1912] 39 Cal. 915=39 I. A. 101=15 I. C. 659 (P.C.).

(3) [1869] 11 W. R. 215.

establish a right of pre-emption. It is admitted that the Talab-i-Moasibat was duly made. The difficulty turns upon performance of the Talab-i-Istishhad. The Munsif has found that, although the demand was made by the plaintiff in the presence of witnesses, there was no express reference to the fact that the immediate claim, or Talab-i-Moasibat, had been duly made. It was contended before us by the learned vakil for the appellants that it is necessary under the Mahomedan law that not only this demand should be made in the presence of witnesses but that they should be asked to bear testimony to the declaration that the demand had been duly made. This is in conformity with the views expressed by the text-book writers and has been affirmed by their Lordships of the Calcutta High Court in the Full Bench decision in *Rujjub Ali Chopedar v. Chundi Churn Bhadra* (4). In that case the point referred was whether it was necessary that the pre-emptor should declare that he has made the Talab-i-Moasibat and, at the same time, should invoke witnesses to attest it. The answer of their Lordships was unanimously in the affirmative. The words given in the Hedaya, Grady, p. 556, are as follows :

"Such a person has bought such a house of which I am the Shafi. I have already claimed my privilege of Shufa and am now again claiming. Be therefore the witness thereof."

The authorities upon this point have been also discussed by their Lordships of the Allahabad Court in *Muhammad Ahmad Said Khan v. Madho Prasad* (5). On the other hand our attention has been drawn to the case of *Chatu v. Husain Bakhsh* (6), where their Lordships of the Allahabad Court appear to have held that the mere presence of the witnesses was sufficient and no specific invocation was necessary. It is to be observed however that this ruling has been practically dissented from in *Mubarak Husain v. Kaniz Bano* (7). The view taken by the learned Munsif therefore seems to be right. But upon the question of fact the learned Subordinate Judge has come to a finding which concludes the matter. Disagreeing with the Munsif, he has found that the plaintiff did call upon the witnesses to bear testimony to the fact that

he had performed the previous ceremony. Now, although the learned Munsif has disbelieved the plaintiff upon this point, it was open to the learned Subordinate Judge to take a contrary view and his finding is conclusive in second appeal. The result therefore is that the decree made by the learned Subordinate Judge is correct. With regard to the right of irrigation and the right of vicinage, the claim to pre-emption does not seem to have been pressed before the Subordinate Judge on these grounds. The appeal therefore will be dismissed with costs.

Jwala Prasad, J.—I agree to the order proposed.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1919 Patna 497

DAWSON-MILLER, C. J. AND ROE, J.
Ratnakar Gountia and others—Defendants—Appellants.

v.

Chamra Satpasty and others — Plaintiffs—Respondents.

Appeal No. 5 of 1918, Decided on 11th April 1919, from original order of Sub-Judge, Sambalpur, D/- 19th February 1918.

* (a) Civil P. C. (1908), O. 34, R. 3—Foreclosure suit—Preliminary decree not complied with—Final decree not passed—Mortgagors have no absolute right to redeem.

If the preliminary decree in a foreclosure suit is not complied with, the mortgagors have no absolute right to pay the redemption money and avoid foreclosure merely on the ground that a final decree has not been passed. [P 500 C 1]

(b) Practice—Waiver—Parties consenting are not entitled to get benefit for failure to abide by procedure in same way as if they had objected from start.

If the parties consent to a course which is not strictly in accordance with the procedure prescribed by the rules, and take no objection to it, they are not entitled to turn round afterwards and seek to get some benefit from the failure to abide by the procedure in the same way as if they had objected at the start or if they had no notice of it. [P 500 C 2]

B. N. Sinha—for Appellants.

Satish Chandra Bose—for Respondents.

Dawson-Miller, C. J.—This is an appeal from an order of the Subordinate Judge of Sambalpur, dated 19th February 1918, dismissing an application for an extension of the time for redeeming a mortgage in a foreclosure suit by three of the defendants in that suit who were interested in the property as mortgagors.

The plaintiffs in the suit were second mortgagees of the property in question

(4) [1890] 17 Cal 543 (F.B.).

(5) [1916] 29 All 133=35 I. C. 911.

(6) [1893] A.W.N. 101.

(7) [1905] 27 All. 160.

and before they instituted their suit the first mortgagees had obtained a mortgage decree. The plaintiffs therefore made the second mortgagees as well as the mortgagors the defendants in the present suit. The first mortgagees are defendants 18 and 19, the other defendants are the mortgagors or others interested claiming through them. The defendants who have brought the present appeal are defendants 11 to 13 in the suit. The suit was decreed in favour of the plaintiffs on 1st May 1914 and an order was made that the plaintiffs should be at liberty to redeem the prior mortgagees, defendants 18 and 19, and that the other defendants including the present appellants, as mortgagors should within six months from the date when the prior mortgagees were redeemed by the plaintiffs pay off to the plaintiffs the decretal amount including the sum which they had paid to the prior mortgagees within six months from the date of payment otherwise foreclosure was ordered.

It appears that an appeal was lodged against that decision and came up to the High Court and by consent of the parties the case was remanded by the High Court to the Subordinate Judge with directions to ascertain the improvements which it was claimed by the prior mortgagees, who had been in possession that they had made to the property, because this sum apparently had not been ascertained and they could not be redeemed until the sum was ascertained. It was directed that the amount found due to the prior mortgagees for improvements should be added to the redemption money payable by the plaintiffs. The matter went back then to the Subordinate Judge and the amount for improvements was ascertained and assessed at a sum of Rs. 1,100. It is obvious from what I have said that the original decree having been modified, it was necessary that a further decree in the case should be passed. In the meantime, on 18th November 1916, the defendants by an order of the Subordinate Judge of that date were allowed six months in which to redeem the plaintiffs from the date when the plaintiffs redeemed defendants 18 and 19, and failing this there was to be a foreclosure. At that time the amount of the improvements had not been ascertained but they subsequently were ascertained; and on 15th May 1917

a preliminary decree was passed whereby it was ordered that the plaintiffs should pay into Court a sum of Rs. 1,100 to the account of defendants 18 and 19 within two months (that would bring the date up to 15th July 1917), and that the other defendants, including the present appellants should pay the sum decreed in the mortgage suit including the Rs. 1,100 to the plaintiffs within four months from that date. (That would bring it up to 15th November 1917.)

The money in fact was deposited by the plaintiffs within time, that is to say on or before 15th July 1917 and therefore under that decree which I have just referred to of 15th May 1917, the time allowed to the present appellants and the other defendants would expire on 15th November. On 22nd December 1917, neither the appellants nor the other defendants having taken any steps to redeem the plaintiffs the matter came before the Subordinate Judge to pass the final decree and it appears that at that time one Gokul Chandra Babu had acquired the right and title of the whole of the defendants other than Nos. 18 and 19 in their equity of redemption and he presented a petition for final orders in the case and for a final decree praying in fact that foreclosure might be ordered he not being in a position to pay off the mortgagees. It ought to be mentioned that that application was made and heard before the Subordinate Judge in presence of all the defendants or their pleaders who represented them and in the presence of the nazir of the Court who was the guardian of the present appellants who were minors. That appears from the decision of the learned Subordinate Judge in the order which is appealed from and which I shall refer to presently. The decision came to on that occasion by the learned Subordinate Judge was that which appears in the order sheet as O. 117, dated 22nd December 1917. It says:

"Judgment-debtors have not deposited the decree money. So on the petition of Gokul Chandra Babu decree is made final and it is ordered that the judgment-debtors are debarred absolutely from redeeming the mortgaged properties. Plaintiffs will be put into possession of the mortgaged properties free from all claims of the judgment-debtors."

And in pursuance of that decision a decree was drawn which undoubtedly contains certain clerical errors. The de-

decree which is dated the same day and signed by the Judge apparently on 11th January 1918, instead of referring in the preliminary part of it to the application of Gokul Chandra Babu and instead of referring to the preliminary decree passed on 15th May 1917 (the earlier one of 1st May 1914 having been set aside when the case was remanded by the High Court), did in fact read in this way:

"Upon reading the decree passed in the above suit on the 1st day of May 1914 and the application of the plaintiffs dated the 1st day of December 1914 and after hearing Babu B. P. Chatterji, vakil for the plaintiffs, and Babu J. N. Sen, vakil for defendants 13 and 19, and Babu R. N. Misra, for Nriparaj Gountia and Babu Parsuram Misra, pleader for the other defendants and it appearing that the payment directed by the said decree has not been made, it is hereby decreed as follows."

Then follows the operative part of the decree, which debars the defendant and all persons claiming through or under him from all right to redeem the mortgaged property and ordering the plaintiffs to be put in possession.

There was no appeal from that judgment and decree, which was the final decree in the case directing foreclosure and giving possession to the plaintiffs. But the present appellants, on 28th January 1918, filed a petition, notwithstanding that the final decree had been passed, claiming an extension of the time prescribed by the preliminary decree for redeeming the plaintiffs and getting back possession of their property, and setting out the history of this case their petition prays that it may be held that the order (the word is "order," but it is a mistake for decree), dated 22nd December 1917, forfeiting the right of redemption and the order of 15th May 1917 (which is the preliminary decree) are invalid and inoperative, and the applicants may be permitted to deposit the entire decretal amount and redeem the mortgaged property. When that application came before the Subordinate Judge on 19th February 1918, the questions which were discussed before him were questions as to the power of the Subordinate Judge in the preliminary decree of 15th May to order, as he did, that the defendants should redeem the plaintiffs four months after they had redeemed the prior mortgagees, because under the previous order of 18th November 1916, the plaintiffs had been allowed six months

to redeem. The learned Judge however pointed out that in the preliminary decree he had properly interpreted the order previously made on 18th November and he also pointed out that this order had not been set aside; and, further, it was pointed out that the final decree had been passed in the case and there had been no appeal from that. But in any case the learned Subordinate Judge came to the conclusion that the applicants in their affidavit really disclosed no case whatever for extending the time, even if the applicants were to be allowed six months from the time when the plaintiffs redeemed the prior mortgagees, and that even when that time expired they were not then in a position to pay the money into Court. Further, he pointed out that all the orders in the case and the decrees had been made in the presence of the Nazir who represented the applicants, now the appellants, and that therefore not having appealed from the final decree, they could not at a later date come before him and ask for an extension of time in respect of a matter which was concluded by the final decree.

From that order the appellants have appealed. It seems to us that this appeal cannot possibly stand. In the first place, it is quite clear that a final decree has been made in this case and that unless it is set aside by a proper procedure, it is absolutely binding upon the applicants. It can only be set aside in one of three ways—either by an appeal to the High Court or by an application under O. 9 or by an application for review of judgment, and none of these courses has been taken. The appellants however ask us to say that the final decree passed on 22nd December is invalid and inoperative, and therefore that in fact no final decree in the case has been passed at all, and they go further and say that where no final decree has been passed notwithstanding that the preliminary decree limits the time within which they may apply to redeem, nevertheless they may still apply after the time has expired and before a final decree has been passed, and claim as a right to pay in the redemption money and avoid foreclosure. It is not necessary for us in this case to decide that last point although some argument has been addressed to us upon it and various cases not under the present

Code of Civil Procedure but under S. 86 and the following sections of the Transfer of Property Act have been referred to. It seems to me, reading the order and rules of the Civil Procedure Code which relate to this matter, that it is clear that if the preliminary decree is not complied with, the mortgagors have no absolute right to pay the redemption money and avoid foreclosure merely on the ground that a final decree has not been passed. It seems to me quite clear that O. 34, R. 3, by the proviso to Cl. (2) of that rule, contemplates that the Court may or may not, as it shall think fit, extend the time for the payment, and if it is to be held that the mortgagors have an absolute right to pay in the money after the time for payment has expired, it is difficult to see what can be the meaning of the proviso to which I have just referred. However that may be, it is not necessary, as I say, to determine this question because we have come to the conclusion without much difficulty that the final decree passed on 22nd December 1917 is a valid decree. The first reason which has been urged before us for treating it otherwise is that there appear in the preliminary part of that decree two errors which, in our opinion, are clearly clerical errors. I have already referred to them in an earlier part of this judgment, and it is not necessary to repeat them again. It is not difficult to see how these errors may have arisen.

It is probable that the decree muharrir, in making this decree, in going through the record which is one of some length and looking for the applications for a final decree and endeavouring to ascertain what was the preliminary decree, had come across the application by the plaintiffs dated 1st December 1914, which in fact was made on the first preliminary decree dated 1st May 1914, and then through carelessness, not realizing that that decree had been set aside and that a fresh preliminary decree had been made after the case was remanded and that a fresh application for a final decree had consequently been made, went no further in his search in the record. But these are purely clerical errors, such as can be rectified by the Court which passed the decree and they do not seem to me to affect the matter in any way.

The next objection which was taken and the last is one in which I also think

that there is no substance. It was contended that under the rules the application for a final decree must be made by the plaintiff and that in the present case no such application had been made, and therefore the decree was in itself a nullity. It is quite true that the application in this case was not made by the plaintiffs, but was made, as I have said, by Gokul Chandra Babu who was at that time standing in the shoes of the defendants, having purchased their interest. The present appellants, who were represented as I have said by the Nazir, were parties to that, in that the application was made in their presence and no objection was taken to it at that time. The plaintiffs themselves were also acquiescing parties in that application, and I do not think that the present appellants, who are the defendants, have any right, after the matter had been determined in their presence and without objection, to turn round and say that there was no jurisdiction in the Court to pass a final decree. It is unnecessary to deal with the matter further. It is quite clear to me that if the parties consent to a course which is not strictly in accordance with the procedure prescribed by the rules and take no objection to it, they are not entitled to turn round afterwards and seek to get some benefit from the failure to abide by the procedure in the same way as if they had objected at the start or if they had had no notice of it. In my opinion, this appeal must be dismissed with costs.

I think the final decree of 22nd December 1917 must go to the Subordinate Judge to be corrected in conformity with the judgment. The judgment clearly refers to the petition of Gokul Chandra Babu, and the decree refers to an application of 1st December 1914. Again, by what is obviously a clerical error, the preliminary decree is referred to as that passed on 1st May 1914, whereas in fact it was a decree passed at a later date.

Roe, J.—I agree.
V.S./R.K.

Appeal dismissed.

* A. I. R. 1919 Patna 501

MULLICK AND JWALA PRASAD, JJ.

Mt. Dhanwanti Kuer—Judgment-debtor—Petitioner.

v.

Sheo Shankar Lall—Decree-holder—Opposite Party.

Civil Revn. No. 284 of 1918, Decided on 28th March 1919, against order of Dist. Judge, Shahabad, D/- 9th September 1918.

* (a) Civil P. C. (1908), O. 21, R. 89—Judgment-debtor, subsequently parting with property to stranger, can apply to set aside sale.

A judgment-debtor who has, subsequent to the sale of his property in execution of a decree, parted with the property to a third person, can nevertheless apply under R. 89, O. 21, to set aside the sale. [P 502 C 2]

(b) Civil P. C. (1908), S. 115 and O. 21, R. 89—Decision on question whether judgment-debtor is entitled to apply under O. 21, R. 89 is subject to revision.

The question whether a judgment-debtor is entitled to make an application under O. 21, R. 89, is one of jurisdiction, and decision of the Court below upon the question is subject to the revisional jurisdiction of the High Court under S. 115 of the Code. [P 502 C 1, 2]

Susil Madhab Mullick and Narendra Nath Sen—for Petitioner.*Kulwant Sahay, Tribhuban Nath Sahay and Nitai Charan Ghosh*—for Opposite Party.

Mullick, J.—A preliminary point is taken by the learned vakil for the opposite party that no question of jurisdiction is involved; that the Court had a right to decide whether or not a judgment-debtor who has sold his property subsequent to the sale is entitled to make a deposit under O. 21, R. 89, and if the Court has made an error of law in deciding the point that error does not constitute any illegality or material irregularity in the exercise of jurisdiction. In my opinion the principles of *Malkarjan v. Narhari* (1) do not apply. Here the Court could only adjudicate upon the application, if it was presented by a person fulfilling the character required by R. 89. The Court's decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction. An erroneous decision on a question of law or fact, after jurisdiction has been once legally assumed, would not be a ground for interference under S. 115, Civil P. C., but if the decision is the very basis and foundation of jurisdiction

in its limited sense as distinguished from powers, it at once comes within the purview of the section. The judgment of their Lordships of the Privy Council in *Balkrishna Udayar v. Vasudeva Aiyar* (2) is, in my opinion, authority for this view.

The next question is whether the decision of the Subordinate Judge should be restored. Now O. 21, R. 89, amends S. 310-A of the former Civil Procedure Code, by which deposits could be made by any person whose immovable property had been sold. The amending words

"any person either owning such property or holding an interest therein by virtue of a title acquired before such sale"

have, by letting in persons who are not parties to the execution proceedings, clearly widened the operation of the rule. Bearing this in mind as the object of the amendment, how has it affected the judgment-debtor? The statute itself does not set at rest the conflict of decisions under the older Code, in illustration of which it is only necessary to state that while Jenkins, C. J., in *Maganlal v. Doshi Mulji* (3) held that S. 310-A enables a judgment-debtor to make a deposit who had sold the property after the sale, their Lordships of the Allahabad and Madras Courts in *Ishar Das v. Asaf Ali* (4) and in *Subbarayadu v. Lakshminarasamma* (5) took the view that unless the applicant is, at the time of the application, an owner, or holds an interest in the property, he cannot get the benefit of the rule. These authorities have been carefully considered by a Division Bench of the Bombay High Court in *Pandurang Laxman Uphade v. Govinda Dada Uphade* (6), and I venture to think with great respect that the object and scope of the rule have been correctly stated in that judgment.

It seems to me that the matter really turns upon the effect of the auction sale. As has been observed by their Lordships of the Privy Council, the property passes from the judgment-debtor to the auction-purchaser at the moment of the sale irrespective of the time of confirmation: *Bhawani Kumar v. Mathura Pra-*

(2) A. I. R. 1917 P. C. 71=40 Mad. 793=44 I. A. 261=40 I. C. 650 (P. C.).

(3) [1911] 25 Bom. 631=3 Bom. L. R. 255.

(4) [1912] 34 All. 186=13 I. C. 134.

(5) A. I. R. 1914 Mad. 46=33 Mad. 775 = 22 I. C. 193.

(6) [1917] 40 Bom. 557=37 I. C. 211.

(1) [1901] 25 Bom. 337=27 I. A. 216 (P. C.).

sad Singh (7). If that is so, then the judgment-debtor retains no transferable interest after the sale. He may have a right to make a deposit, but that is not a right which can be transferred. For the purpose of making an application under R. 89, he can be neither an owner nor a person holding an interest in the property at the time of the application. If therefore R. 89, is to be limited to a person so qualified at the time of the application, then the judgment-debtor, who certainly is one of the persons for whose benefit the rule was enacted, is incompetent to apply. Therefore I think that the qualification must refer to the moment immediately before ownership passed. I agree with their Lordships of the Bombay Court in thinking that the law intended to assist the judgment-debtor if by making a private sale subsequent to the auction sale he could secure a better price for his property. A further point was taken by the learned vakil for the petitioner that the decree-holders had not obtained a valid title to the property, and that the judgment-debtor was still the owner thereof. It is contended first that the judgment-debtor was not holding the estate of a Hindu widow; and secondly, that the deed of release executed by her, not being sufficiently stamped, could not be treated as a conveyance transferring the property to Namdeo. Now these are questions which it was competent for the Subordinate Judge to decide after he had assumed jurisdiction. They are not necessary for the foundation of jurisdiction, and therefore whether they have been rightly or wrongly decided is immaterial for the purposes of S. 115, Civil P. C. The result is that the learned District Judge has, in my opinion, wrongly refused to exercise jurisdiction in declining to accept a deposit from the judgment-debtor. Under S. 115, Civil P. C., we set aside his order and direct that the order of the Subordinate Judge be restored with costs throughout.

Jwala Prasad, J.—I agree that the question raised in this appeal as to whether the judgment-debtor was entitled to apply under O. 21, R. 89 of the Code is one of jurisdiction, and the decision of the Courts below upon the point is therefore subject to our revisional jurisdiction

under S. 115 of the Code. The property in dispute was sold in execution of a decree on 4th December 1917 as belonging to the judgment-debtor Dhanwanti Kuer. She disposed of the property on 22nd December 1917, and on 2nd January 1918 applied to have the sale set aside on her depositing in Court the necessary amount. The learned District Judge, disagreeing with the Subordinate Judge, has held that the judgment-debtor has no *locus standi* to make an application to set aside the sale under O. 21, R. 89, inasmuch as she did not at the date of the application own the property in question. It is contended on her behalf that the view taken by the learned District Judge is not correct in law. The point is not free from difficulty, and, as a matter of fact has led to great divergence of opinion in the Courts that had hitherto occasion to interpret the law in the present Code. The Allahabad and the Madras High Courts have taken the view that a judgment-debtor who, after the sale, has parted with the property is not entitled to come under O. 21, R. 89, whereas the Bombay High Court has taken a contrary view. The cases have already been referred to in the judgment of my learned brother. I have myself felt very great difficulty in making up my mind. In fact, the language in the aforesaid rule is not happily worded. After a careful consideration of the object and scope of the rule, as well as upon a true construction of it, I have come to the conclusion that the judgment-debtor is not deprived of his right to have the sale set aside under the aforesaid rule, which he undoubtedly had under the old Code. The words in the present Code,

"any person either owning such property or holding an interest therein by virtue of a title acquired before such sale"

have been substituted for the words in the old Code "any person whose immovable property has been sold." The property may be owned by the judgment-debtor, or it may be owned by some other person, and sold as the property of the judgment-debtor. It is with a view to allow such persons other than the judgment-debtor, as well as those who as co-sharers or as mortgagees may have held some interest in the property by virtue of a title acquired before the sale, that the aforesaid amendment was made. The object of the amendment in the present

rule is therefore not to curtail the right of the judgment-debtor but to widen the scope of the rule by allowing persons other than the judgment-debtor to come in. The words in the rule therefore if not repugnant otherwise, should be so construed as to give effect to the intention of the legislature. It is obvious that the intention of the legislature was not to take cognizance or notice of any event subsequent to the sale, for the rule expressly recognizes only such interest in the property as may have been acquired before such sale. Any act committed by the judgment-debtor affecting the property will not therefore be taken notice of by the Court in an application under R. 89, and hence the judgment-debtor's disposing of his property will not deprive him of the right to come in under that rule. Keeping the above remarks in view, the language in the rule, though not happily worded, will, after careful consideration support the construction that the judgment debtor may, in spite of his having parted with the property, claim the benefit of the rule. Leaving out the words in the rule that do not apply to the present case, it will run as follows :

"Where immovable property has been sold in execution of a decree any person owning such property may apply to have the sale set aside."

These words carry the same import as the words in the old Code :

"Any person whose immovable property has been sold may apply to have the sale set aside."

It is obvious that any person owning immovable property at the time of its sale in execution of a decree may apply to have the sale set aside. The judgment-debtor, who has made the present application to set aside the sale under R. 89, will therefore clearly come under the said words. If it was intended that the owner of the property, such as the judgment-debtor owning so the property at the date of the sale, should not be allowed to apply on account of his having parted with the property by sale or otherwise subsequent to the execution sale, it would have been clearly stated in the rule. In the absence of a clear restriction upon the right of a judgment-debtor, which he had at the time of the sale, it would be manifestly unjust to refuse the judgment-debtor the benefit of the rule. It would be beyond the scope of R. 89 to inquire into any transaction subsequent to the sale and to find out the motives for such a transaction. With great respect to the

learned Judges of the other High Courts who have taken a contrary view, I am of opinion that the judgment-debtor's application was properly made and that the Court had no option but to entertain it. I therefore agree with the order proposed by my learned brother. I do not consider it necessary to give any opinion as to whether the judgment-debtor had any interest in the property after the sale and before the confirmation of the sale which he could validly transfer.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 503

DAWSON-MILLER, C. J. AND ROE, J.
Jahar Mal—Plaintiff—Appellant.

v.

G. M. Pritchard—Defendant—Respondent.

Second Appeal No. 5 of 1918, Decided on 8th April 1919, from decision of Dist. Judge, Sambalpur, D/- 22nd November 1917.

(a) **Practice—Power of Court—Discretion exercised upon entirely erroneous grounds—Discretion is not proper and should not be allowed to stand.**

Where the law leaves a matter to the discretion of a Court, and the Court decides to exercise that discretion, and does exercise it, but bases its decision upon entirely erroneous grounds, the discretion cannot be said to have been exercised in a legal and proper manner and cannot be allowed to stand. [P 505 C 1]

(b) **Limitation Act (9 of 1908), S. 5 — Delay in taking steps—Indulgence should not be shown.**

Parties ought not to be encouraged to defer till the very last moment the taking of a step in the course of an action for which a limit of time is prescribed by rules, and no indulgence ought to be shown to a party who so puts off taking action, if by an unexpected accident he exceeds the time limit. [P 505 C 2]

Janki Nath Bose and Satish Chandra Bose—for Appellant.

B. N. Sinha—for Respondent.

Dawson-Miller, C. J.—In this case the plaintiffs sued the Gangpur Light Tramway Co., Ltd., and Mr. Pritchard, their manager, to recover a sum of Rupees 3,945, the principal amount of a loan, together with interest for money lent to Mr. Pritchard, alleging that the money was borrowed by him as manager on behalf of the Tramway Company. They succeeded before the Subordinate Judge in obtaining a decree against both Mr. Pritchard and the Company. That judgment was dated 28th August 1916 and, with a view to appeal, the defendant

company, on the same day, applied to obtain copies of the judgment and decree. On 2nd September they were notified by the office of the requisite number of folios and stamps required. These folios and stamps were supplied in due course, and the copy was ready for delivery on 9th September. According to the rules the defendants had 30 days for appealing reckoned from 9th September, but from 26th September to 29th October the Courts were closed in consequence of the vacation, so that the time was therefore extended until the first day after the opening of the Court after the vacation, viz., 30th October. The result was that instead of having only 30 days for lodging their appeal the defendant company did, in fact, have over 50 days altogether. Notwithstanding this however the memorandum of appeal was not filed until 8th November, which was eight days after the time when it ought to have been filed.

When the appeal came on for hearing before the District Judge he had to consider in the first instance, whether he should, in the circumstances which were disclosed, extend the time for filing the appeal in favour of the defendant company. The case put forward by the defendants before the District Judge is contained in two affidavits, one made by the Managing Agent of the company, Mr. Bhupendra Nath Basu, and another made by Mr. Kali Das Lahiri, who is the Head Assistant of the company in Calcutta. The first affidavit does not throw very much light upon this question. In effect it says that the Managing Agent left Calcutta for Simla to attend a meeting of the Viceroy's Council on 2nd September and was detained there until 27th September and arrived back in Calcutta on 29th September. That he instructed his Head Assistant to take the opinion of the directors as to the course to be taken with a view to an appeal, that so far as he was concerned he left the matter there and went away to Darjeeling for the Puja holidays and came back again on 29th October, which was the last day of the vacation. Between the time that he went to Darjeeling and the time when he came back he does not appear, so far as the affidavit is concerned, to have communicated at all with Mr. Kali Das Lahiri to see what steps were being taken with a view to prosecuting the appeal. He seems

to have left everything in that gentleman's hands.

The second affidavit, that of Mr. Kali Das Lahiri, the Head Assistant, is to this effect. He corroborates what is said in the previous affidavit, and he says that he did consult the directors; on 16th October he obtained their consent to appeal, and they directed him to file the appeal. As the Courts were closed until 30th October he could not file the appeal until that day arrived; but until 29th October no steps at all were taken, either to consult his vakil or legal adviser at Sambalpur where the appeal had to be filed, or to have the necessary memorandum of appeal prepared. Although it is not definitely stated in his affidavit I think perhaps, it may be inferred in his favour that he intended, on 29th October to leave Calcutta and go to Sambalpur for the purpose of having his appeal filed in the ordinary way; but I should like to mention, in passing, that in so doing he was running things very fine. It is, we are told, about a day's journey and rather a difficult journey by train from Calcutta to Sambalpur, and if he had left on 29th October he could not have arrived at Sambalpur till the following day, which was the last day for filing the appeal. There he would have had to consult his legal adviser, and the memorandum of appeal would have had to be prepared and filed on the same day. It is just possible that he may have been able to do that, but the reason which he alleges for not proceeding to Sambalpur on 29th October is that he was taken ill on that day and was confined to his bed until 1st November. He says that he was so ill in fact that it was impossible for him to communicate his inability to go to Sambalpur to Mr. Bhupendra Nath Basu, the Managing Agent. He does not say in his affidavit that he was so ill that he was unable to instruct anybody else to proceed to Sambalpur on his behalf to take the necessary steps for filing the appeal. I suppose all that was necessary for the purpose would be the documents in the case, which would have to be laid before his pleader in order to put him in possession of the necessary facts for filing the appeal. These, it seems to me, could easily have been handed over to somebody else on his behalf; and although there is a doctor's certificate to say that he was ill of colic for four days from

29th October, this does not in itself seem to me to be a sufficient reason for failing to file the appeal in time.

Had it been necessary for me to decide this question and to use my discretion in the matter, I should certainly have come to the conclusion that no sufficient reason had been made out, but the learned Judge who had to determine this question arrived at the conclusion that sufficient cause had been shown for the delay. If the matter had stood there I should have been very loth, whatever my own view of the matter, to interfere with his discretion; but the learned Judge seems to me to have based his decision upon entirely erroneous grounds. Although he was entitled and in fact it was his duty to exercise his discretion, if one finds that the conclusions of fact at which he arrived which were the basis of his decision were not such as could possibly support that decision, then I think this Court is entitled, and, indeed, is bound, to say that that discretion was not exercised in a legal and proper manner. What the learned Judge found was this. He accepted the facts set out in the affidavits as he was entitled to do and came to the conclusion that the head assistant was prevented from travelling from Calcutta to Sambalpur on 29th October. But he goes on and says:

"Although it appears remiss on his part not to have taken steps to have had the appeal forwarded by other means, it would be a hardship on the appellants to debar them owing to the carelessness of a servant from the appeal."

Now having read that part of the learned Judge's judgment it seems to me that the conclusion at which he arrived was in fact not that the illness of the head assistant prevented this appeal from being filed in time, but that if the head assistant had exercised ordinary diligence notwithstanding his illness the appeal might have been filed within the proper time, and it was only through his remissness that this course was not adopted. Then the learned Judge goes on and says it would be a hardship on the appellants to debar them owing to the carelessness of a servant from the appeal. I entirely dissent from the view taken by the learned Judge. If parties in this Court choose to entrust these matters to their servants then they must take the consequences of any remissness or negligence which may be exhibited on the part of

their servants, and they cannot come to Court and say:

"This is a very hard case. Had my servant done his duty as I expected he would, then my appeal would have been in time; therefore I pray that some indulgence may be shown to me."

That is not a ground upon which the Courts ought to exercise in their discretion any indulgence in favour of litigants, and therefore I think that the decision of the learned District Judge in allowing the time to be extended for filing this appeal cannot possibly stand. There is one other matter I should like to draw attention to. It is a matter which is continually being brought to the notice of the Courts in this country, and that is this: It almost invariably happens that one party or the other intending to appeal or to take some other step in the course of an action for which a time limit is prescribed by the rules, waits until the very last moment before taking that step. Sufficient time in all these cases is granted to the parties for doing whatever may be necessary for furthering their suit, and if they choose to put off until the very last minute either the filing of the appeal or the taking of any other steps which are a necessary part of the prosecution of their case they run a very great risk, and it does not seem to me that it is sufficient for a party to come to Court and say that if everything had gone absolutely smoothly, and if no unexpected accident had happened, he would have been in time in taking the steps required for his appeal. One is not entitled to put things off to the last moment, and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other may happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and if they choose to rely upon everything going absolutely smoothly and wait till the very last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court. For these reasons I think this appeal must be allowed upon the first point which has been raised. It is therefore not necessary to go into the merits of the appeal, what-

ever these merits in this particular case may be. The appeal will be allowed with costs here and in the lower appellate Court. The judgment of the District Judge will be set aside, and the decree of the Subordinate Judge against the appellants as well as the other defendant will be restored.

Roe, J.—I agree. The District Court's order made upon the facts found is directly contrary to the principle that the master is responsible for the negligence of his servant. I also desire to associate myself entirely with the views of the learned Chief Justice with regard to the most objectionable practice of putting off to the last moment what ought to be done at leisure. Those who take this course must accept the consequences of an accident at the eleventh hour.

V.S./R.K. *Appeal allowed.*

A. I. R. 1919 Patna 506

MANUK, J.

Imaman—Plaintiff—Appellant.

v.

Sham Sagar Rai—Defendant—Respondent.

Second Appeal No. 981 of 1917, Decided on 15th January 1919, from decision of Sub-Judge, Arrah, D/- 18th July 1917.

Limitation Act, (1908), S. 12—Decree signed few days after delivery of judgment—Time between them should be excluded—Period of long vacation held time requisite for obtaining copies.

A judgment was delivered on the 21st September, but the decree was not signed till 25th September. The Court closed for the long vacation on 26th September and reopened on 30th October. Defendant applied for copies on 31st October, which were ready for delivery on 12th November. The appeal was filed on 22nd November:

Held: (1) that the time which elapsed between the delivery of judgment and the signing of the decree should be excluded in computing the period of limitation for the appeal; (2) that the period during which the Court was closed for the long vacation was time requisite for obtaining copies within the meaning of S. 12 and the appeal was therefore within time. [P 507 C 1,2]

Muhammad Tahir—for Appellant.

Parmeshwar Dayal—for Respondent.

Judgment.—The plaintiff-appellant instituted a suit for recovery of certain lands from the defendant in the Court of the Munsif of Arrah. That Court decreed the plaintiff's claim. There was an appeal by the defendant to the District Judge, who has remanded the case for certain findings by the 1st Court.

The only question raised before me here in second appeal by the plaintiff-appellant is one of limitation. It is necessary therefore to set out certain dates. The judgment of the trial Court was delivered on 21st September 1916 and the decree was signed on 25th September 1916. From 26th September to 28th October the civil Courts were closed for the annual long vacation, both days inclusive. The 29th was a Sunday and the Courts reopened on the 30th October. On the following day 31st October the defendant applied for copies of the judgment and the decree of the learned Munsif and on the same day he was informed of the requisite number of folios which he must file. On 1st November he deposited those folios. On 13th November, copies were ready and on 16th they were delivered to him. He filed his appeal in the Court of the District Judge on 22nd November.

It is argued by Mr. Tahir on behalf of the plaintiff-appellant that inasmuch as the defendant did not apply for copies of the judgment and the decree on 30th October 1916, that is on the very first day that the Court reopened after the long vacation, when he so applied on 31st October his appeal was already barred by limitation, as 31st October is more than 30 days from either the date of the judgment or the date of the signature on the decree. In other words, the learned vakil contends that the defendant is not entitled to exclude for the purpose of limitation either the period between 21st and 25th September, or the period between 26th September and 29th October, the reason being that on 30th October the Court was open; and in order to save his appeal from limitation it was his bounden duty to apply for copies on that date. I have been referred on behalf of the appellant to a number of authorities on these two questions, first, as to whether the period between the date of the judgment and the date of signature on the decree should be excluded in computing limitation; and secondly, as to whether the period between the date of the signature and the date on which the Court reopened should be similarly excluded. Had the matter been *res integra* so far as this Court is concerned, I might have been disposed to consider the various

authorities and come to an independent decision. It appears however that the second of these two questions was considered by a Division Bench of this Court in the case of *Debi Charan Lal v. Sheikh Mehdi Hussain* (1), and under precisely similar circumstances that Division Bench held that the whole of the time which elapsed between the delivery of the judgment and the reopening of the Court was part of the time requisite for obtaining the necessary copies under S. 12, Lim. Act, and should therefore be excluded in computing the period of limitation applicable. In that case the plaintiff obtained a decree on 27th September 1913. It was prepared and signed on the same day. The Court was closed from 28th September to 31st October, both days inclusive, and the defendant applied for a copy of the judgment on 3rd November and for a copy of the decree on 13th November.

In the case before me the defendant is on somewhat stronger ground because whereas in *Debi Charan Lal v. Sheikh Mehdi Hussain* (1) the defendant waited for several days after the Courts reopened before he applied for his copies, in the case before me he waited only a single day. I can find no point of distinction in favour of the appellant's contention in the case before me and the learned Khan Bahadur has very properly conceded that it is not possible to distinguish the case there decided from this case. He has therefore urged me to refer this appeal to a Division Bench. I do not however feel at all inclined to do so more particularly having regard to the fact that, when the appeal was argued in the lower appellate Court the point of limitation was not urged on behalf of the present appellant. Had it been so urged I feel that it was more than possible that the learned Judge might have been disposed, even if he held that the appeal was barred by limitation, to extend the time as he had discretion to do under S. 5, Lim. Act, for good and sufficient reason shown. Nor do I feel that that decision requires reconsideration, at any rate not strongly enough to justify the reference prayed for. Finally I hold that that decision has governed the rule of practice in the subordinate Courts for over 2 years now and as the Judicial Committee pointed out in the

(1) [1916] 1 Pat. L. J. 485=35 I. C. 883.

very recent decision in *Brij Indar Singh v. Lala Kanshi Ram* (2), it would cause great inconvenience to interfere with a rule which is in the nature of a rule of procedure and may have been acted on since that decision.

With regard to the period between 21st September and 25th September, the decision of a Full Bench of this Court in *Ram Asray Singh v. Sheonandan Singh* (3) governs the case. It was there held that the appellant was entitled under S. 12, Lim. Act (1908) to deduct the time between the delivery of judgment and the signing of the decree in computing the period of limitation prescribed for his appeal.

No other matter has been referred to and it is conceded that if the period between the 25th September and the 30th October is excluded from computation the defendant was within time in filing his appeal. I therefore dismiss the appeal with costs.

V.S./R.K.

Appeal dismissed.

(2) A. I. R. 1917 P. C. 156=45 Cal. 94=44 I. A. 213=42 I. C. 43 (P. C.).

(3) [1917] 1 Pat. L. J. 573=35 I. C. 868.

A. I. R. 1919 Patna 507

DAWSON-MILLER, C. J. AND ROE, J.
Gobind Ramanuj Das—Plaintiff—Appellant.

v.

Devendrabala Dasi—Defendant—Respondent.

Appeal No. 1 of 1918, Decided on 11th April 1919, from Original Decree of Sub-Deputy Collector, Puri, D/- 4th June 1918.

(a) **Behar and Orissa Tenancy Act (2 of 1913), S. 16—S. 16 applies to cases of complete transfer—Landlord's consent is necessary to complete transfer of sarbarakari tenure.**

Section 16, Orissa Tenancy Act, is applicable to cases in which a transfer is complete and valid as against the landlord, but a transfer of a sarbarakari tenure is not complete and valid as against the landlord until he has given his consent to it. [P 509 C 1]

(b) **Behar and Orissa Tenancy Act (2 of 1913), Ss. 16 and 31—Suit by landlord to recover fees for registration of transfer—Consent is not implied.**

Where consent has not been given, the institution of a suit by the landlord to recover the amount of the fee payable to him for registration of a transfer is not an indication of consent, nor does any cause of action arise, and the plaint cannot be amended by adding a statement that the landlord is willing to acknowledge the transfer as valid against himself. [P 510 C 2]

(c) Behar and Orissa Tenancy Act (2 of 1913), S. 3 (4) (b)—Person vested with powers of Deputy Collector is Deputy Collector and Collector.

A person vested by the Local Government with powers to discharge any of the functions of a Deputy Collector under the Bihar and Orissa Act is a Deputy Collector within the meaning of S. 3 (4) and (6) of the Act, and a Collector within the meaning of that section. [P 510 C 2]

Rash Behari Ghosh, J. N. Bose and M. S. Das—for Appellant.

Dwarka Nath Mitter, K. N. Chatterji and S. N. Chatterji—for Respondent.

Judgment.—This is an appeal from a decision of the Sub-Deputy Collector of Puri, dated 4th June 1918, decreeing the suit of the plaintiff, who represents the Paikpara Estate, against the defendant-appellant, Mahant Gobind Ramanuj Das, for a sum of Rs. 14,289-3-0, being the fee payable under S. 16, Orissa Tenancy Act, for the registration of the appellant's name in the respondent's registers, and interest on that sum at 12½ per cent per annum. No oral evidence was adduced by either party at the trial, and the only documentary evidence put in was the deed of transfer and certain settlement papers relating to the property. The facts therefore must be taken from the admission in the pleadings. The plaintiff, in so far as it is material, alleges that the property in question constitutes the zamindari of the plaintiff; that the defendant purchased the property in suit under a registered kobala from certain persons who were miadi sarbarakars under the plaintiff, and on 5th October 1917 applied for mutation of names in the plaintiff's sherista, praying also for exemption of mutation fees; that the plaintiff's officers in Puri asked the defendant and his officers to pay the mutation fee of Rupees 14,289-3-0 and that the defendant has not yet paid the same and is in possession of the property; that the defendant is liable to pay this sum to the plaintiff according to law and that the plaintiff is entitled to have it. It then alleges that the proportionate rent of the miadi sarbarakari tenure payable by the defendant is Rs. 2,381-8-6, the mutation fee claimed being six times that sum. It further alleges that the cause of action arose on 12th July 1916 when the plaintiff came to know of the defendant's purchase.

The material part of the written statement alleges that the suit should be dismissed for want of cause of action; that the plaintiff is not entitled to the muta-

tion fees claimed and the defendant is not liable to pay any mutation fee or any portion thereof. It denies that the defendant applied for exemption of mutation fees, but does not deny that he applied for mutation of names or that the plaintiff's officers in Puri asked the defendant and his officers to pay the mutation fee, nor does it deny that the property is in possession of the defendant. Upon these pleadings the following issues were framed:

(1) Is the suit maintainable? (2) Has the plaintiff any cause of action to bring the suit? (3) Is plaintiff entitled to the fees claimed? (4) Can plaintiff recover any amount from the defendant by suit? (5) Is plaintiff entitled to any and what relief?

The learned Sub-Deputy Collector found on issue 1 that the suit was maintainable under S. 250, Orissa Tenancy Act. On issues 2 and 4 he found that the landlord's offer to register the transferee's name, if the latter pays the requisite fee, is sufficient to give rise to a cause of action. On the third, that the fee payable was under S. 16, Cl. (b), six times the annual rental, and on issue 5 that interest at 12½ per cent might be allowed. Sir Rash Behari Ghosh for the appellant urged, in the first instance, that the Sub-Deputy Collector had no jurisdiction to try the suit; secondly, that S. 16, Orissa Tenancy Act, does not apply to the transfer of a tenure which is not transferable without the consent of the landlord or, at all events, not until that consent has been obtained and the transfer thereby completed. On this point he argued that even if the section is applicable to a case in which the tenure is not transferable without the consent of the landlord, the plaintiff cannot bring a suit to recover the registration fee because when the statute imposes an obligation on any person and prescribes the mode in which that obligation is to be discharged, the discharge of the obligation can only be enforced in the manner prescribed by the statute. He next contended that the landlord cannot maintain a suit to recover a fee unless there has been an application for registration in his sherista. He further argued that the suit is premature for the reason that until a reasonable time had been given for the application for registration, it could not be said that the transferee of a tenure was liable for the fees leviable under S. 16; and lastly, that

the plaintiff is not entitled to claim interest.

We may deal first with the contention that S. 16 does not apply to a transfer of a tenure which is not transferable without the consent of the landlord, for if this ground succeeds the suit must be dismissed upon this issue, and it will be unnecessary to discuss the remaining points covered by the argument on behalf of the appellant. S. 16 runs as follows:

"(1) In cases other than those covered by S. 15, when any tenure or portion of a tenure is transferred by sale, gift or exchange, the transferee or his successor-in-interest shall apply to the landlord to whom the rent of the tenure or portion thereof is payable for registration of the transfer, and the landlord shall, in the absence of good and sufficient reason to the contrary, allow the registration of the transfer. The fee payable on such transfer shall be—(a) In the case of a sale, Rs. 25 per centum of the consideration money, or the fee specified in Cl (b), whichever is greater, and (b) in the case of gift or exchange, a fee six times the annual rental of the tenure or portion thereof, as the case may be, or, if rent be not payable in respect of the tenure or portion, then a fee of Rs. 10." We must accept, on the pleadings before us, the fact that an application for registration has been made by the defendant in respect of the tenure, which is a sarbarakari tenure.

A sarbarakari is a sub-proprietor, and such is by S. 6 (iii) deemed to be a tenure-holder for the purposes of Ss. 14 to 20 of the Act. This class of tenure is excluded from the operation of S. 15. On a transfer of a sarbarakari tenure the transferee is therefore required by S. 16 to apply to the landlord to whom the rent of the tenure or a portion thereof is payable for registration of the transfer. We have no doubt that that section would be applicable in cases in which a transfer is complete and valid as against the landlord, but a transfer of such a tenure as that under consideration is not complete and valid as against the landlord until the landlord has given his consent to it. It must therefore be determined whether such consent was given because if it was not, it follows that in our view there was no transfer of the tenure within S. 16 (1). On a reference to the plaint it will be observed that it is not sugges-

ted that such consent has been given. All that is said is that the plaintiff's officers in Puri, upon the application for registration, asked the defendant and his officers to pay the larger mutation fee, which was refused. There is in this case no suggestion that they, the officers in Puri, had authority to give consent, much less that they gave such consent. The sequence of events contemplated by S. 16 (1) seems to be that first the transferee shall apply to the landlord for registration, and that the landlord shall then allow the registration and that upon his allowing the registration a fee shall become payable.

The landlord is within his rights in refusing his consent in the case of a non-transferable tenure. If he should refuse no registration can be enforced by the transferee, and sub-S. (3), S. 16, will not avail him. It should be inferred from the pleadings that registration was asked for and refused, which is tantamount to a refusal of consent. How then can it be said that the landlord who has refused to consent to the transfer can claim that which is only payable on a transfer taking place? In the argument before us the learned vakil for the appellant has intimated that he is quite willing to pay the fee prescribed in S. 16 (1) (a) viz., 25 per cent of the purchase price amounting to Rs. 3,000, contending that the alternative fee prescribed by sub-Cl. (b), viz., six times the annual rental, does not apply as no rent is payable to the landlord by a sarbarakar but only revenue. This is, no doubt, the real dispute between the parties. The respondent however refused to accept this and contends that the matter is concluded by the pleadings. No doubt the plaint alleges that rent is payable by the defendant, and there is no specific denial of this in the written statement. The appellant therefore takes his stand upon the position that there has been no transfer within the meaning of the section. There are many cogent reasons for holding that until the landlord's consent to registration has been obtained no fee is payable. Dr. Mitter however contends that registration being compulsory the landlord may, as soon as the transfer becomes known to him, although incomplete until his consent is obtained, call upon the transferee to apply for registration and deposit a fee. That does not seem to be the

meaning of the section, for there may be many cases in which a transferee might have good reasons for not making such an application, as, for instance, he might know that his application would be rejected, and in that case the making of an application would merely put the tenants of the estate upon notice that the transferee's position was a precarious position, and result in their taking advantage of Cl. 4, S. 16, to refuse all payment of rent; or again it might be that the fee known to be payable would be so large that it would be better to risk the consequences of failure to make an application rather than to pay the requisite fee. It might turn out that the transferee had made a bad bargain and did not wish to complete his title by paying a large registration fee to the landlord, and it would be unreasonable to hold that in such a case he should be obliged to apply for the landlord's consent and thereby complete his title against his will, rendering himself liable to a further outlay for registration fees. It has been held in the case of *Mritunjoy Praharaj v. Sree Jaganath Jew* (1) that a landlord is entitled to sue for the fee leviable upon an application for the registration of the transfer of an occupancy holding, even when the transferee has failed to make any application for such registration. It should be noted however that the procedure to be followed in cases of the transfer of occupancy rights under S. 31, is somewhat different from that prescribed by S. 16. Under S. 31, the ultimate arbiter upon the application of the transferee is not the landlord as in the case of a nontransferable tenure, but the Collector, who shall decide whether the transfer shall be registered or not even in cases where the landlord objects; but, assuming that the decision given in that case in respect of the payment of registration fees under S. 31, applies equally to the landlord's rights under S. 16, it was there held that the landlord's right to levy a fee was contingent upon his consent to the transfer. This appears clear from the following passage from the judgment:

"It is the duty of the tenant to apply to the landlord for his consent, and once the landlord has given his consent the tenant is clearly liable to pay the fee prescribed by the Act. In this case the landlord has voluntarily consented to a transfer of the tenancy to the defendant, and once he has done this his right to sue arises, even

though the tenant may not have expressly applied for registration."

In the case now under consideration it does not appear that the landlord ever consented to the transfer. It seems clear on the sequence of events contemplated by the section that until the consent has been given no cause of action will arise. We are asked by Dr. Mitter to hold that the filing of the suit is in itself an indication of the landlord's consent; and it is suggested by him that if it is necessary definitely to state in the plaint that the landlord had given his consent to the transfer, he was prepared to make an amendment to his plaint to the effect that the landlord was willing to acknowledge the transfer as valid against himself. But he was not in a position to add to the plaint a statement to the effect that before the filing of the suit any intimation had been given to the defendant of the plaintiff's consent to the transfer. It is well settled that a cause of action must be antecedent to the institution of the suit and cannot arise from the pleadings themselves. It follows that the landlord's consent not having been given before the institution of the suit there was at the time of the institution of the suit no cause of action, and that the plaintiff's suit must be dismissed. It is not necessary therefore to consider the remaining issues. The objection to jurisdiction was not pressed, and we would note only that our attention has been drawn to a notification in the Bihar and Orissa Gazette vesting Babu Raghabananda Das by the Local Government with powers to discharge any of the functions of a Deputy Collector under the Act. He is therefore a Deputy Collector within the meaning of S. 3 (4) and (6) and is therefore a Collector within the meaning of that section and therefore had jurisdiction to try this suit. We note further that upon the question of interest Dr. Mitter admits that he is unable to support the judgment of the Sub-Deputy Collector. The result of our findings is that the suit must be dismissed as disclosing no cause of action. The appeal will be allowed, the judgment and decree of the Sub-Deputy Collector will be set aside, and in lieu thereof judgment will be entered for the defendant with costs here and in the Court below.

V.S./R.K.

Appeal allowed.

(1) [1918] 3 P. L. J. 351=47 I. C. 34.

A. I. R. 1919 Patna 511

IMAM, J.

D. Sunder—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 86 of 1918, Decided on 14th May 1918, from order of Dist. Magistrate, Monghyr.

Criminal P. C. (1898), S. 195—Information to police not false to knowledge of accused—Sanction for prosecution under S. 182, I. P. C., should not be given—Penal Code (1860), S. 182.

A sanction under S. 195, Criminal P. C., must be based on materials on the record before the Court. Where there is nothing to show that the information given by the accused was false to his knowledge or that he believed it to be false, no sanction for prosecution for an offence under S. 182, I. P. C., should be given. [P 514 C 1]

Hasan Imam—for Petitioner.*Govt Pleader*—for the Crown.

Judgment.—The petitioner is undergoing trial under S. 182, I. P. C., before the Sadar Subdivisional Officer of Monghyr. The circumstances which have culminated in this prosecution are shortly these :

The petitioner is a Sub-Manager in the Darbhanga Raj and is in charge of the Kharagpur Circle, which is situated in the Monghyr District. It appears that there is a Kund known as Rishi Kund with a temple in plots 77 and 79 respectively in village Birojpur in the zamindari of the Banaili Raj and in the possession of the mahant of Bhola Nath. Contiguous with the Banaili Raj property is the zamindari of the Darbhanga Raj. The two estates are demarcated by a line of pillars since 1908 and there has been since then no kind of dispute between the two zamindaris. There are also some hot springs situated in the Darbhanga Raj land in the neighbourhood of the Rishi Kund and the temple mentioned above. These hot springs are visited by pilgrims every three years for the purposes of worship, and such offerings as are made on these occasions are collected by the servants of the Darbhanga Raj. It is alleged that there has been an attempt on the part of the mahant to take these offerings and that the petitioner was informed that the mahant had, in fact, gathered men to forcibly carry out his intention. Apprehending a breach of the peace, the petitioner on 12th September 1917 wrote to the District Magistrate of Monghyr to the effect that he had received from the

Raj officers placed near the hot springs alluded to above information purporting to be that a Sub-Inspector of Kharagpur Thana had helped the mahant on a previous occasion and that the present Sub-Inspector had shown some indications of displeasure, and that for that reason he prayed the District Magistrate to depute a responsible Police Officer other than a Sub-Inspector or a Deputy Magistrate for preventing the apprehended breach of peace, the cost of which would be met by the Darbhanga Raj. It appears that Babu Charu Chandra Choudhury was accordingly deputed by the District Magistrate to proceed to the spot and make necessary inquiries. Babu Charu Chandra Choudhury, having arrived on the spot, relaid the boundary and found that the disputed portion of the land on which these hot springs fell within the property of the Darbhanga Raj. It appears from a note submitted by this officer on 16th March 1918 that the Sub-Inspector had issued notices on both sides to prevent a breach of the peace. It also appears from that report that at the time of the inquiry the petitioner had represented to this officer that the Sub-Inspector should not have issued notices on the servants of the Darbhanga Raj when the land in dispute was situated within the boundary of the Raj property. The note further goes on to say that the Deputy Magistrate made a local inquiry as to whether the Sub-Inspector had helped any particular party. The note also says that the result of the inquiry was embodied in a report dated 10th November 1917 and was submitted to the District Magistrate. Nothing seems to have been done in the case so far as the petitioner is concerned till 2nd January 1918, when the District Magistrate of Monghyr passed the following order :

“Owing to an oversight no final orders have been passed by me on this report. This oversight has been brought to my notice by the Superintendent of Police. I now pass orders as follows : I am satisfied from this report that the Sub-Inspector of Kharagpur Thana has done his duty in the matter and that the complaint made against him by the Sub-Manager has been unjustified. Inform all concerned and file.”

It appears from the explanation furnished by the District Magistrate of Monghyr that on 17th December the Superintendent of Police had drawn the attention of the District Magistrate to the case and had told him that the Sub-Inspector

of Kharagpur Thana was constantly urging to be allowed to proceed against the petitioner for defamation, on account of allegations made by him in the letter that he had written to the District Magistrate on which Babu Charu Chandra Choudhury had been deputed to inquire and report. It also appears that the Sub-Inspector could not proceed in the matter unless there was a final order passed by the District Magistrate on the said report. Two days after the final order quoted above had been passed, the District Magistrate received an application from the Sub Inspector with the previously obtained permission of the Superintendent of Police praying for sanction to prosecute the petitioner under S. 182, I. P. C. This sanction was duly granted and the prosecution of the petitioner was started. The petitioner contends that his prosecution under S. 182, I. P. C., is bad inasmuch as the sanction to prosecute him was obtained without any notice served upon him, that the information given by him to the District Magistrate was in fact not found to be false by any competent authority before the sanction was given, that the information given by him to the District Magistrate did not contain any false information as his knowledge was based on what he has received as a report from his Forest Ranger and other responsible officers of the Raj, and lastly that there was nothing in the proceedings before the District Magistrate to show that the information given to him by the petitioner was false to the knowledge of the petitioner and that he believed the same to be false. On the above grounds he prays, firstly, to quash the proceedings or in the alternative to transfer the case from the file of the trying Magistrate to the file of any other Magistrate or pass such order as might appear to this Court to be proper. In order to appreciate the exact position relating to the grant of sanction to prosecute the petitioner, it is necessary to consider those portions of the letter written by the petitioner to the District Magistrate which have been considered the basis for the sanction for the prosecution under S. 182, I. P. C. The letter is a very long one, but the portions that are relevant to the matter before me are as follows:

"But I regret to bring it to your notice that in consequence of the improper proceeding of the

Sub-Inspector in charge of the Kharagpur Thana at Rishi Kund yesterday, it is feared that there will be a disturbance of some sort on Sunday, 16th September 1917, and that trouble and annoyance will arise. But yesterday the Sub-Inspector of the Kharagpur Thana visited Rishi Kund and called up some of the Darbhanga Raj servants and peons who were on duty there, saying that he had come to inquire into the allegations contained in a petition which the mahant had written. I am informed that the Sub-Inspector lost his temper and became violent, threatening and intimidating the Darbhanga Raj servants, although he was repeatedly assured that there had been no breach of the peace of any sort and that everything was perfectly quiet in the place. Notwithstanding this however the Sub-Inspector, I am told, has arranged to help the mahant with reference to his petition, and I learn that he will again visit Rishi Kund springs on Saturday next, 15th September, and try to forcibly put the mahant in possession of them on Sunday morning. I am further informed that the mahant himself has arranged for men of bad character to attend on Sunday morning and disturb the public tranquillity, and with the help of the Sub-Inspector of Police he will obtain forcible possession of the springs in the lands which belong to the Darbhanga Raj."

The letter in question began with the words, "Sir, I am directed to inform you as follows" and is dated 12th September 1917. Two days after the petitioner received a letter from the District Magistrate of Monghyr which runs as follows:

"Sir, I am in receipt of your letter of 12th instant in which you have been good enough to give me certain information under which the mela is being held at Rishi Kund hot springs. You inform me in para. 6 of your letter under reply that you are directed to bring certain matters to my notice and to ask me to issue certain orders to the Sub-Inspector of Police at Kharagpur, and you also proceed to say that you are instructed to ask me to depute certain officers to the spot on Saturday and Sunday. In reply I have the honour to request you to be good enough to let me know from whom you have received the directions and instructions referred to."

The petitioner replied to the above letter of 19th September 1917. This also is a long letter and all that is necessary for the purposes of this case is to refer to such portions of it as are material. The petitioner in this letter says firstly that his letter of the 12th September was written to the District Magistrate on the authority of the Hon'ble Maharaja Bahadur of Darbhanga. He next thanks the District Magistrate for having sent a guard of one head constable and eight constables for keeping the peace at the fair. He then says that in the circumstances, as known to him and his subordinates at the time the letter was written to the District Magistrate, there

was no other course left to the Raj but to lay the facts before the head of the district and to await his help for maintaining the public tranquillity. Thereafter he details in the letter the points of difference that have arisen between the Mahant and the Raj and winds up the letter by saying that the latter had tried with the help of the Kharagpur police to establish his title and right to land situated in the Darbhanga Raj but had failed completely in his endeavours to give the Raj annoyance and trouble.

These are the facts and circumstances under which the sanction to prosecute the petitioner under S. 182, I. P. C., was accorded. One of the ingredients to prove an offence under that section is that the accused should know or have reason to believe that the information given by him was false. It is essentially a case in which mens rea must be established either by direct evidence or by the circumstances of the case and the conduct of the accused. It has been contended for the petitioner that before any sanction could be given to prosecute him it was necessary for the learned District Magistrate of Monghyr to satisfy himself that the conduct of the accused fell within the mischief of S. 182, I. P. C., and that for this it was necessary that there should have been before the learned District Magistrate some evidence either direct or inferential, to establish the fact that the information was false to the knowledge or belief of the petitioner. For this proposition reliance was placed upon *Habibur Rahman v. Munshi Khodabux* (1) and *Govindan Nayar, In the matter of the petition of* (2). My attention was also drawn to grounds Nos. 4 and 5 of the petition. These two grounds are follows:

1. For that the order is bad in law and liable to be set aside inasmuch as there is nothing to show that the informations were false to his knowledge or he believed them to be false. (2) For that the order is otherwise bad in law and without jurisdiction. I looked up the explanation furnished by the learned District Magistrate of Monghyr with reference to these grounds and found that these grounds have been disposed of by the words "no remarks." Thereupon I asked the learned Government Pleader

who appeared for the opposite party to tell me if there was anything on the record to show that the learned District Magistrate had anything before him to satisfy himself as regards the knowledge or belief of the accused regarding the falsity of the information given by him. The learned Government Pleader was unable to point out anything from the record to show that such was the case, but asked me to give him an opportunity to communicate with the learned District Magistrate to find out whether there was any such material before him at the time the sanction to prosecute the petitioner was granted. I accordingly allowed the case to stand over for the learned Government Pleader to be instructed on this point.

The case was again taken up on 3rd May 1918 and the learned Government Pleader informed the Court that he had no material to show that the information given by the petitioner to the District Magistrate was false to his knowledge or belief. In the absence of any such direct evidence it is necessary for me to consider whether there are circumstances in this case to show that the petitioner when giving information to the District Magistrate knew or had reason to believe that it was false. There is nothing on the record to show that the petitioner had any malice against the Sub-Inspector. There is also nothing to show that he had any reason to disbelieve the reports made to him by his subordinates nor is there anything to indicate that the information given by him to the District Magistrate was within his personal knowledge. On the contrary the letters written by him to the District Magistrate read together clearly point out that he was wholly relying upon the reports he had received from his subordinates. It should also be remembered that there was an apprehension of a serious breach of the peace and that the petitioner invoked the protection of the District Magistrate impelled not so much by the desire to injure any particular officer of the police as to avert the breach of the peace that was likely to take place. It may be that in giving the District Magistrate the information contained in his letters he placed too much confidence on the report of his subordinates. These however cannot be regarded in the circum-

(1) [1907] 11 C. W. N. 195=5 Cr. L. J. 29.

(2) [1884] 7 Mad. 224.

stances of the case as evidence of mala fides on his part. In fact the whole of the record is singularly wanting in proof of any mala fides on the part of the petitioner against the Sub-Inspector. It seems to me therefore that it was not open to the learned District Magistrate to grant sanction for the prosecution of the petitioner without having before him some material upon which he could hold that the information given by him was false to his knowledge or belief. I therefore set aside the sanction given by the District Magistrate to prosecute the petitioner and order all further proceedings in the case to be stayed.

V.S./R.K. *Sanction set aside.*

A. I. R. 1919 Patna 514

COUTTS, J.

Nand Kishore Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 55 of 1919.
Decided on 14th March 1919.

Criminal P. C. (5 of 1898), S. 369—High Court passing judgment in revision—Review is incompetent.

The High Court has no power to review its judgment pronounced in revision in a criminal case: 14 Cal. 42 (F. B.); 10 Bom. 176 (F. B.) and 7 All. 672, Foll.; 3 I. C. 393, Doubtful.

[P 514 C 1]

S. Sinha—for Petitioner.

Sultan Ahmad—for the Crown.

Judgment.—The learned Government Advocate raises a preliminary point that I have no power to review my order of 11th March 1919, and in support of his contention he refers to the rulings in *F. W. Gibbons, In re* (1), *Queen-Empress v. C. P. Fox* (2) and *Queen-Empress v. Durga Charan* (3). In the first case cited it was held by a Full Bench of the Calcutta High Court that a verdict and judgment of a Division Bench of the High Court was final and that as soon as they had been pronounced and signed, neither the Court nor any Bench of it had power to revise the decision or to interfere with it in any way. In *Queen-Empress v. C. P. Fox* (2) it was held that a Division Bench of the High Court had no power to review its judgment pronounced in revision in a criminal case and the decision was the same in the case of *Queen-Empress v. Durga Charan* (3). In each

of these cases it was a judgment of a Division Bench of the High Court which was in question, and it is not contended by Mr. Sinha for the petitioner that this view of the law is not correct, but he relies on the case of *Bibhuty Mohun Roy v. Dasimoni Dassi* (4) in which it was held by a Bench of the Calcutta High Court that where a case had been disposed of in default of appearance, the Court had power to restore the case and to hear and determine it, and he argues that the order of 11th March 1919 cannot be taken to be a judgment. I am unable to accept this argument. The application was dismissed, not merely because no one appeared on behalf of the petitioner, but because it was pointed out by the learned Government Advocate that more than two months had elapsed since the date of the order which had been passed under S. 144, Criminal P. C., and that therefore the order was no longer in force. Whether this view was right or wrong does not affect the matter. The point is that the dismissal was not merely on account of non-appearance but for another reason also. The order therefore, although it does not dispose of the application on the merits, is a judgment. The case relied on by Mr. Sinha was one in which the application was dismissed purely and simply for default, and it does not apply to the present case. I may remark however that the view which was taken in that case has been dissented from by a Full Bench of the Madras High Court in the case of *Ranga Row v. Emperor* (5). In that case it was held that no distinction can be made between an appeal in which an order is passed without hearing and one in which there is a hearing and that even where a revision petition has been dismissed for default, a High Court cannot review its order. There is thus some doubt even in the case of a revision application which is dismissed for default, but the question does not really arise because as I have already pointed out this application was not dismissed only for default. This application for review and for restoration of the case is therefore rejected.

V.S./R.K. *Application rejected.*

(4) [1909] 3 I. C. 393.

(5) [1912] 16 I. C. 518.

(1) [1887] 14 Cal. 42 (F. B.)

(2) [1886] 10 Bom. 176 (F. B.).

(3) [1885] 7 All. 672.

* A. I. R. 1919 Patna 515

DAS, J.

Mahomed Mian — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. No. 18 of 1919, Decided on 7th May 1919, against order of Dist. Magistrate, Purnea, D/- 9th April 1919.

* (a) Criminal P. C. (5 of 1898), S. 526—Application for transfer—Guiding principles are apprehension of bias or case prejudged by Magistrate.

A long series of cases has established the guiding principles upon which Courts should invariably act in dealing with applications for transfer. These are : (1) that it is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is bias against him in the mind of the Magistrate, though there may not be in fact actual bias ; (2) the transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him. [P 515 C 2]

(b) Criminal Trial—Procedure — Shutting out questions tending to establish defence is illegal.

An accused is entitled to ask the Court to consider his defence, whether true or false, and the Court acts illegally in shutting out questions which tend to establish this defence. [P 516 C 1]

* (c) Evidence Act (1872), S. 151—Indecent and scandalous questions—When Court may forbid and when not stated.

Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions, though they may be indecent or scandalous. [P 516 C 1]

(d) Evidence Act (1872) S. 151—Questions in cross-examination put to subsequent witnesses and not to earlier—Admissibility is not affected—Questions even scandalous or indecent should not be disallowed.

Where questions are put in cross-examination to some of the witnesses for the prosecution which have not been put to earlier witnesses, it is the weight to be attached to the case that is affected and not the admissibility of the questions, and it is no ground for disallowing them even though they are scandalous or indecent. [P 516 C 2]

(e) Evidence Act (1872), S. 151—Advocate's discretion in putting particular question to witness must not be fettered.

Advocates have ample discretion in the con-

duct of the case of which they are in charge, and the Court cannot fetter their discretion by insisting that their case should be put to this witness or that. [P 516 C 2]

(f) Criminal Trial — Intimidating accused or counsel is highly improper.

It is highly improper for persons in charge of a prosecution to threaten or intimidate either the accused persons or the pleaders appearing for them. The position of accused persons is at all times of grave anxiety and persons in charge of a prosecution should remember that nothing should be done by them which may have the effect of intimidating the defence or adding to its anxiety. [P 517 C 1]

M. Huque and Gour Chandra Pal—for Accused.

Sultan Ahmad—for the Crown.

Judgment.—This is an application for transfer of a criminal case from the Court of the Deputy Magistrate of Purnea to some other criminal Court. The petitioner complains that the Court has taken up an attitude with regard to him which leads him to believe that he would not get a fair and impartial trial at the hands of the learned Deputy Magistrate and he accordingly invites this Court to transfer the case to the file of some other Magistrate. A long series of cases have established that (1) it is expedient for the ends of justice to transfer a case from the file of one Magistrate to that of another competent to try it, if, by reason of the words or conduct of the Magistrate before whom the case is pending, any party reasonably apprehends that there is a bias against him in the mind of the Magistrate, though there may not be in fact any actual bias, and (2) the transfer of a case should be ordered when there are circumstances which may reasonably lead the petitioner to believe that the Magistrate has to some extent prejudged the case against him and will in consequence be prejudiced against him. As Lush, J., said in the celebrated case of *Serjeant v. Dale* (1) :

"The law, in laying down the strict rule, has regarded not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

These being the guiding principles upon which the Court invariably acts in dealing with applications of this nature, I have to consider whether, in the circumstances of this case, I should direct the

(1) [1877] 2 Q. B. D. 558.

transfer of this case from the file of the Deputy Magistrate of Purnea to that of some other Magistrate. The petitioner contends before me that the learned Deputy Magistrate has not only shut out his defence but has prejudged it with this result that so far as that Court is concerned, there is little chance of his being able to establish his defence. He says that one of the main motives for the institution of this case is that Rama Murti, the Circus Proprietor, who is the real complainant,

"was baffled in his attempt to get hold of a woman with whom he, the petitioner, is living as husband and wife."

Now this case may be true or false, but it seems to me that he was entitled to ask the Court to consider his case. It appears however that the learned Magistrate shut out all questions in cross-examination which tended to establish this defence. The learned Deputy Magistrate, in his explanation to this Court, justified the ruling which he gave on this point, on two grounds first, the questions were scandalous and not necessary for the decision of the case, and secondly, the suggestions were made at a late stage and were not put to the earlier witnesses examined on behalf of the prosecution.

So far as the first ground is concerned, the learned Magistrate was clearly in error; indecent or scandalous questions may be put either to shake the credit of a witness or as relating to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. If they are put merely to shake the credit of a witness, the Court has complete dominion over them and may forbid such questions, even though they may have some bearing on the question before the Court. But if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed, the Court has no discretion to forbid such questions, though they may be indecent or scandalous. The learned Magistrate thought that in a case of alleged misappropriation, scandalous questions should not be allowed to be asked. But the case of the defence is that no one would have heard of this alleged misappropriation if scandalous circumstances did not exist. It seems to me that the questions related to matters

necessary to be known in order to determine whether or not the facts in issue existed and therefore should have been allowed to be put.

The second ground put forward by the learned Deputy Magistrate is equally without merit. It is true that the case as suggested by the questions which were disallowed was not put to some of the earlier witnesses examined on behalf of the prosecution. That, in my opinion, affects the weight to be attached to the case, not the admissibility of the questions. Advocates have ample discretion in the conduct of the case of which they are in charge, and the Courts cannot fetter their discretion by insisting that their case should be put to this witness or that. There may be perfectly good explanations why this particular case was not put to some of the earlier witnesses. If a satisfactory explanation is not ultimately given as to why the case of the defence was not put to some of the earlier witnesses, the Court would be entitled to approach that case with suspicion, but the stage for explanation had not arrived, and the Court was not entitled to disallow the questions on that ground. The learned counsel for the petitioner says that the Court has already made up its mind that the defence must be false because it was not put to some of the earlier witnesses. Another fact prominently brought to my notice is the note of the learned Magistrate to the effect that he

"did not much value instructions on these matters from a man of the moral character of the accused."

In my opinion, the petitioner may reasonably be apprehensive after this expression of opinion that the Court has prejudged his defence. Instructions on these matters could only be given by the petitioner, and if the learned Magistrate does not value these instructions, the petitioner may reasonably think that it would be worse than useless for him to put forward his defence before the Magistrate trying the case. I think therefore that a transfer is expedient in this case. I ought to state however that, in my opinion, the Magistrate has no real bias against the petitioner. But he has unfortunately used words which are calculated to create in the mind of the petitioner a reasonable apprehension that justice may not be done to him. I can-

not too strongly press upon the Magistrate that:

"next to the importance of deciding a case fairly and impartially is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing, but absolute justice would be done to them;" see *Lalit Mohan Moitra v. Suraj Kanta Acharjee* (2).

I have no doubt whatever that the learned Deputy Magistrate would have tried the case fairly and impartially, but I have also no doubt that, without intending it, he has unfortunately conducted himself in such a way as has created in the mind of the petitioner a reasonable apprehension that he will not secure absolute justice from him. In this view, and without casting the slightest reflection on the Magistrate, I deem it expedient that the case should be transferred from his file. There is one matter which I cannot pass by in silence. The petitioner alleges that when the questions which were subsequently disallowed by the Magistrate were put on his behalf to Krishnarao, Babu Jyotish Chunder Bhattacharjee, who was appearing for the complainant in this case,

"said something indicating a threat that Rama Murti would take legal steps against the defence pleader."

The learned Magistrate, in his explanation, denies that Mr. Bhattacharjee held out a threat that Rama Murti would take legal steps against the defence pleader, but he admits that he said that Rama Murti might further proceed. In my opinion, the distinction sought to be made by the learned Deputy Magistrate is without a difference. Babu Jyotish Chunder Bhattacharjee is a vakil of standing and eminence and, I am unwilling to believe that he could have used expressions which have been imputed to him by the learned Deputy Magistrate; but I deem it my duty to say that it is highly improper for persons in charge of prosecution to threaten or intimidate either the accused persons or the pleaders appearing for them. The position of accused persons is at all times one of grave anxiety, and persons in charge of prosecutions should remember that nothing should be done by them which may have the effect of intimidating the defence or adding to its anxiety. I direct that the case be transferred to the file of the District Magistrate of Bhagalpore, who will either

try it himself or make it over to some officer competent to try it.

V.S./R.K.

Case transferred.

A. I. R. 1919 Patna 517

DAS, J.

Dawarka Prasad and others—Plaintiffs—Appellants.

v.

Makhu Lal—Defendant—Respondent.
Appeal No. 479 of 1918, Decided on 9th July 1919, from decision of Sub-Judge, Monghyr.

(a) Civil P. C. (5 of 1908), O. 26, R. 9—**Court can hold local inspection only for the purpose of understanding evidence and for no other purpose.**

Order 26, R. 9, Civil P. C., gives no power to a Court to itself hold a local inspection. A Judge can only hold such inspection for the purpose of understanding the evidence and for no other purpose. He must decide the case on the evidence adduced before him, and if he finds that complete justice cannot be done without a local investigation, he has power under the rule above quoted, to appoint a commission for this purpose; the fact that the plaintiff has not applied for this to be done, does not relieve the Judge of the duty imposed upon him of having before him all the material available which is necessary for the determination of the point at issue between the parties. [P 518 C 2]

(b) Civil P. C. (5 of 1908), O. 26, R. 9—**Appellate judgment based on result of local inspection made by trial Court—Judgment is not legal.**

The judgment of a lower appellate Court, based entirely upon a local investigation conducted by the Judge of the Court of first instance himself cannot be sustained in second appeal. [P 519 C 1]

Harendra Nath Sen—for Appellants.

Jagannath Prasad—for Respondent.

Judgment.—This appeal arises out of a suit brought by the appellants for ejectment of the respondent from the land in dispute, on the ground that the defendant has used the land in a manner which renders it unfit for the purposes of the tenancy. In other words, the suit was a suit under the provisions of S 155, Ben. Ten. Act. Now the complaint of the plaintiffs is that the defendant has erected a structure on six cottahs of agricultural land which the defendant purchased from one Phagu, who was the original tenant. The defendant on the other hand maintains that the structure was not raised on the six cottahs of land which he purchased from Phagu, but on one cottah of land which was let out to the defendant for building his house and which adjoins the six cottahs. The Court of first instance thought that it was diffi-

cult to say exactly whether the disputed houses stand over the disputed land or over one cottah of land which was settled with the defendant. He however held a local inspection and, as a result of his local inspection, came to the conclusion that a portion of the house stood on the six cottahs of land but that the remaining portion of the house stood on the one cottah of land. In the result he granted a modified decree to the plaintiffs. There was an appeal by both parties to the lower appellate Court. The respondent complained that the Court of first instance was incompetent to grant any decree at all in favour of the plaintiffs. The respondent's appeal succeeded before the lower appellate Court. The appellants on the other hand maintained that the lower appellate Court should have granted them a decree for ejectment under S. 155, Ben. Ten. Act. The lower appellate Court says this:

"The learned lower Court made a careful local inquiry and was satisfied that these other structures do not stand on the six cottahs. I do not see how the appellant's contention can be accepted."

It is clear to me therefore that the lower appellate Court relied entirely upon the local investigation conducted by the Court of the first instance. The question whether a Court is entitled, under the new Civil Procedure Code, to hold a local inquiry himself has been raised in several cases, but so far as I know, has not yet been decided. So far as the English cases are concerned, it is clear that a Court is not entitled to hold a local inspection inasmuch as it may hamper the Court in coming to a conclusion on the evidence before it. But the Civil Procedure Code of 1882 did, undoubtedly, empower a Court to hold a local inspection, but O. 26, R. 9, which in my opinion, is a complete Code on the subject, gives no power whatever to a Court to hold a local inspection. The point is an interesting one and it is interesting to compare the wording of S. 392 of the Code of 1882 with the wording of O. 26, R. 9. S. 392 of the Code of 1882 provided as follows:

"In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits, or damages or annual net profits, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a

commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

Order 26, R. 9, however provides that:

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property or the amount of any mesne profits, or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

It will be noticed that the words occurring in S. 392, viz., "and the same cannot be conveniently conducted by the Judge in person" have been altogether omitted in O. 26, R. 9, and it is with reference to this that Mookerjee, J., in the case of *Rai Kishore Ghose v. Kumudini Kanta Ghose* (1) says as follows:

"It may be pointed out however that O. 26, R. 9 of the Code of 1908, which corresponds to S. 392, omits the words 'and the same cannot be conveniently conducted by the Judge in person' and when R. 9 requires to be construed, it may be a matter for argument that the intention of the legislature was to adopt the English rule."

The English rule, as I have said before, does not allow a Judge to hold a local inspection himself. But whether under the new Code a Judge is entitled to hold a local inspection or not, it is perfectly clear that he can only hold it for the purpose of understanding the evidence and for no other purpose. He must still decide the case on the evidence adduced before him, and if he finds that it is impossible to decide the case on the evidence before him he has ample power under O. 26, R. 9, to issue a commission to such person as he thinks fit to make such investigation and to report thereon to the Court. The complaint of the Courts below has been that the plaintiffs did not apply for issue of commission, but in my opinion, if the Court thought that it was impossible for it to determine the question at issue between the parties without a local investigation, it was not only competent to him to issue a commission, but it was his duty to do so, and there can be no doubt that the Court of first instance undoubtedly thought it could not do complete justice between the parties without local investigation. The fact that he himself conducted the local investigation shows conclusively that in his opinion complete justice could not be done without such an investigation.

(1) [1912] 14 I. C. 377.

The learned vakil appearing on behalf of the respondent argues that the Court of first instance decided this case not only on the result of his local inspection but on the evidence adduced before it. I am unable to agree with the learned vakil on this point. But whatever may have been the opinion of the Court of first instance, it is to my mind clear beyond doubt that the lower appellate Court based its decision on the local inspection held by the Munsif and on nothing else. In my opinion this judgment cannot be sustained. I would therefore allow this appeal and remit the case to the lower appellate Court with a direction that the lower appellate Court should remit it to the Court of first instance in order to enable it to decide the questions at issue between the parties. If the Court of first instance thinks that it is unable to decide the case without a local investigation or if the plaintiff makes an application before it for the issue of a commission, then the Court of first instance will have power under O. 26, R. 9, to issue a commission to such person as it thinks fit for the purpose of holding a local investigation and to make a report to the Court. The appellants are entitled to the costs of this appeal and of the appeal to the lower appellate Court. The costs incurred in the Court of first instance will abide the result and will be disposed of by that Court. The parties will not be permitted to adduce any further evidence before the Court of first instance either on the question of damage or on any other question at all.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 519

MULLICK AND JWALA PRASAD, JJ.

Hari Singh and others—Petitioners.

v.

Kanchan Mahto—Opposite Party.

Criminal Revn. No. 153 of 1919, Decided on 23rd June 1919, against order of Dist. Magistrate, Monghyr, D/- 24th April 1919.

(a) Penal Code (1860), S. 430—Guilty knowledge is essential.

Guilty knowledge is essential to a conviction for the offence of mischief, and, in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the act of an accused person, it is impossible to uphold a conviction for that offence. [P 521 C 1]

(b) Riparian Rights—Extent of — Others' rights should not be infringed.

A riparian proprietor can only take for the

purpose of irrigation so much water as is necessary without materially diminishing what is to be allowed to descend, and the quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances, depending mainly upon the size of the stream and the proportion which the water taken bears to the entire volume. [P 520 C 2]

*Manuk Jayaswal and L. M. Ganguly—*for Petitioners.

*Purnendu Narayan Sinha and Murari Prasad—*for the Crown.

Mullick, J.—This application for revision arises out of a dispute regarding irrigation rights in a natural stream called the Bagra, which flows northwards from the Kharagpore hills and passes at one stage of its course through Perganna Sahroi, which belongs to the Raja of Banaili. In this portion the villages both on the right and left bank of the river are in the possession either of the Banaili Raj itself or in that of the mukarraridars of the Banaili Raj, and those claiming under the mukarraridars. The river then leaves Perganna Sahroi and enters Perganna Haveli Kharagpore, which is the property of the Maharaja of Darbhanga. It has been found as a fact that as soon as it enters this perganna, the bed of it lies wholly within the boundaries of that perganna and that the villages on its east bank appertaining to Perganna Sahroi have no claim to any portion of the bed of the river. In October last the mukarraridar and his tenants put up a bund across the river at a place called Jamhat and by cutting a channel from the eastern bank of the river irrigated certain villages belonging to the mukarraridar. Thereupon a tenant of a village upon the bank of the river in that portion which flows through perganna Haveli filed a complaint before the Magistrate charging the mukarraridar and his tenants with mischief under S. 430, I. P. C. The result was that the accused were convicted and sentenced to a fine of Rs. 25 each.

The learned Sub-Deputy Magistrate who tried the case found that the mukarraridar had no right to use any of the water of the stream for irrigation purposes anywhere above the point at which the river entered Perganna Haveli Kharagpore and that the construction of the bund was made with the intention of causing wrongful loss to the lower riparian proprietors. On appeal the learned

District Magistrate has affirmed that finding, but in the concluding portion of his judgment he says:

That even if the version given by the accused is true they are guilty of mischief, because they have taken the bulk of the water in the stream."

The case for the accused in the trial Court was that the stream had two branches one of which alone they had obstructed and that their user was, having regard to the nature and circumstances, reasonable and sanctioned both by Common law and by prescription. There is no finding by the trial Court on any of these points. But the conviction proceeds mainly upon the finding that the Banaili Raj had no right whatever to take water for irrigation purposes from the river at all. The learned Sub-Deputy Magistrate and the learned District Magistrate have both based their decisions upon a judgment of the assistant settlement officer given in 1907. Now if this decision were correct, it would probably be easy to say that the accused could not have had any bona fide belief that they were entitled to use the water at Jamhat. But I am unable to see from the judgment of the assistant settlement officer that there was any clear finding that the bed of the river above the point at which it enters Perganna Haveli was the property of the Maharaja of Darbhanga, or that the Raja of Banaili had no right to exercise his rights as a riparian proprietor over any portion of it. The assistant settlement Officer was concerned to decide the boundary between certain villages lying on the west in Perganna Haveli, and on the east in Perganna Sahori, and he came to the conclusion that as in the Revenue Survey map the river was within the former Perganna the Maharaja of Darbhanga had a better title than the Raja of Banaili to the whole of it. In order to support his decision upon the question of title with regard to this portion of the river, the assistant settlement officer went into the question of irrigation rights and he found that the tenants of the Banaili Raj were not entitled to exercise any of the rights of riparian proprietors in respect of this portion. But I cannot find any clear finding that in respect of every other portion of the river the Maharaja of Darbhanga and he alone was entitled to exercise irrigation rights to the exclusion of other riparian

owners. Therefore in my opinion, in the absence of any authority for holding that in regard to that portion of the river which is now in dispute the riparian owners have lost their rights, it seems to me that the case must be judged upon the Common law of this country.

The case as to prescription has not been established but it certainly has to be shown that the accused are not entitled to exercise the ordinary rights which are enjoyed by riparian owners in this country in respect of natural streams flowing past the lands occupied by them. The law in this respect has been laid down in a number of rulings of which it is necessary only to cite *Belbhadar Pershad Singh v. Sheikh Barkat Ali* (1). Their Lordships in this case approve of the general principle that a riparian proprietor can only take for the purpose of irrigation so much water as is necessary without materially diminishing what is to be allowed to descend and the quantity of water that can be abstracted and used without infringing that essential condition must in all cases be a question of circumstances depending mainly upon the size of the stream and the proportion which the water taken bears to the entire volume. And Mookerjee, J., cites in support an American case: *Harris v. Harrison* (2), in which occur the following observations:

"A riparian owner is entitled only to the reasonable use of natural water for irrigating his land, although such use may appreciably diminish the flow down to the lower riparian proprietors; the larger the number of riparian proprietors whose rights are involved the greater the difficulty of adjustment, the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each; all these and many other considerations must enter into the solution of the problem but one principle is surely established namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbour."

In this case there is no finding by the trial Court that the accused have absorbed the whole of the water. The learned District Magistrate does find that the accused have absorbed the bulk of it, but in the absence of any consideration or discussion of the circumstances and the reasonableness or otherwise of the user made by the accused,

(1) [1907] 11 C. W. N. 85.

(2) 93 California 676=29 Pacific 325.

it is impossible for us to say that they acted with that guilty knowledge which is essential to a conviction for the offence of mischief. Indeed the Courts below appear to have been mainly influenced by their decision that no part of the water could legally be used by the accused. In our opinion this finding is not based upon any legal evidence and therefore the convictions and sentences must be set aside. The fines, if paid will be refunded.

Jwala Prasad, J.—I agree.

V.S./R.K. *Convictions set aside.*

A. I. R. 1919 Patna 521

DAS, J.

Mangar Singh — Defendant — Appellant.

v.

Bharat Prasad and others—Plaintiffs—Respondents.

Second Appeal No. 1383 of 1917, Decided on 4th April 1919, from decision of Sub-Judge, Muzaffarpur.

(a) Civil P. C. (1908), O. 41, Rr. 17 and 19—Pleader for appellant having no instruction—Judge should dismiss appeal leaving it open to appellant to apply for re-admission.

Where the pleader for an appellant intimates to the Court that he has no instructions to argue the appeal, the proper course for the Judge is to dismiss the appeal under O. 41, R. 17, Civil P. C., so that the appellant may have an opportunity of applying for re-admission of his appeal under O. 41, R. 19. [P 521 C 2]

(b) Civil P. C. (1908), O. 41, R. 31—Sufficient judgment.

A mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment within the meaning of the law. [P 521 C 2]

L. K. Jha—for Appellant.

Ragho Prasad and Awadh Behari Chobey—for Respondents.

Judgment.—This appeal comes before me from the judgment of the Subordinate Judge of Muzaffarpur and arises out of a suit brought by the respondents for recovery of possession of the land, which is the subject-matter of the suit, on the allegation that defendants 3 to 5 had no right to transfer the said land by executing a mukarrari patta in favour of defendant 1. It appears that on the date when the appeal came on for hearing before the learned Subordinate Judge, the appellant was personally present in Court but his vakil stated that he had no instructions to argue the appeal. I think the Subordinate Judge would have

been right under those circumstances to dismiss the appeal under O. 41, R. 17, of the Code, leaving it open to the appellant to apply for re-admission of the appeal under O. 41, R. 19; but the Subordinate Judge did not take this course. He asked the vakil for the respondent to deal with the main facts and features of the case and the learned vakil having dealt with the case from his own point of view, the Subordinate Judge held that the appeal was without substance and dismissed it with costs.

It has been held by this Court in the case of *Mubarak Hussain v. Syed Shah Hamid Hussain* (1), that a mere general statement that on a perusal of all the evidence in the case the Court is satisfied as to a certain set of facts is not a sufficient judgment within the meaning of the law. In the present case the learned Subordinate Judge has bestowed only one line to the whole case, and I am unable to hold that this is a judgment in accordance with law. But it is argued by the learned vakil for the respondent that in substance the dismissal is under O. 41, R. 17, and that he need not have expressed any opinion on the merits of the case at all. I do not agree with this contention, because the form of the judgment made it impossible for the appellant to apply before the Subordinate Judge for re-admission of the appeal under O. 41, R. 19. If he had dismissed the appeal under O. 41, R. 17, it would have been possible for the appellant to come to the Court and ask the Court to re-admit the appeal under O. 41, R. 19. But the course adopted by the learned Subordinate Judge did not leave any option to the appellant. He had to come to this Court in order to show that the judgment of the learned Subordinate Judge is not in accordance with law. The case must therefore be remanded to the lower appellate Court for disposal according to law. I think the appellant is entitled to the costs of this appeal. Costs of the Courts below will abide the result.

V.S./R.K.

Case remanded.

(1) [1917] 38 I. C. 509.

A. I. R. 1919 Patna 522

ATKINSON, J.

Sukhdeo Missir—Petitioner.

v.

Monoolal Sahu—Opposite Party.

Criminal Revn. No. 16 of 1919, Decided on 23rd June 1919, against order of Dist. Magistrate, Purneah, D/- 7th January 1919.

Criminal P. C. (1898), S. 195—Notice to accused is not essential but desirable—Omission to give notice is not illegality—Proceedings are not vitiated for want of notice.

Although the issue of a notice to the accused is not legally essential to validate a sanction granted under S. 195, nevertheless in common moral propriety it is desirable, as a matter of practice and prudence and in common fairness, that a person who is sought to be prosecuted should have notice of the fact that an application has been made for his prosecution under the provisions of that section, and it is in accordance with the traditions of the administration of justice that such person should be permitted to show cause against the grant of sanction for his contemplated prosecution, but an omission to give such notice is not an illegality which would wholly vitiate an order granting sanction. [P 522 C 2]

S. P. Varma—for Petitioner.

A. Majid—for Opposite Party.

Judgment.—The petitioner Sukhdeo Missir seeks in this application to have the order of the District Magistrate of Purnea, dated 7th January 1919, set aside. The order of the District Magistrate was an order under S. 195, Criminal P. C., granting sanction for the prosecution of the petitioner with another under S. 211 read with S. 109, I. P. C. It appears that the petitioner and one Mahabir Sahu instituted a suit against one Monoolal Sahu for wrongful confinement and extortion of money. The suit was dismissed and Monoolal Sahu applied to the learned Sub-Deputy Magistrate who tried the case for sanction to prosecute Mahabir Sahu and Sukhdeo Missir under S. 211, I. P. C. The learned Sub-Deputy Magistrate on 23rd November 1918 declined to grant the sanction applied for. Accordingly Monoolal Sahu applied to the District Magistrate of Purnea for sanction to prosecute the petitioner and Mahabir Sahu, and the learned Magistrate, by the order to which I have referred, granted the sanction in the form requested by the petitioner before him.

The learned District Magistrate however passed the order of 7th January 1919 without serving any notice upon the parties to be affected thereby requir-

ing them to show cause why sanction should not be granted. Strictly speaking in my opinion on the interpretation of S. 195, Criminal P. C. the service of a notice upon the person against whom a sanction to prosecute is applied for is not essential as a legal necessity to validate a sanction granted by the authorities specified in S. 195. The trend of authority seems to be in favour of this view. The rulings in support of this conclusion are reported as *Queen-Empress v. Sheik Beari* (1), *Govindu, In the matter of* (2), *Mangar Ram v. Behari* (3), *Inayat Ali v. Mohar Singh* (4), *Bal Gangadhar Tilak, In re* (5), *Emperor v. Tabarak Zaman Khan* (6) and *Krishnanund Das v. Hari Bera* (7). No doubt although notice is not legally essential to validate a sanction granted under S. 195, nevertheless in common moral propriety it is desirable as a matter of practice and in common fairness that a person who is sought to be prosecuted should have notice of the fact that an application has been made for his prosecution under the provisions of S. 195, Criminal P. C., and it is in accordance with the traditions of the administration of justice that such person should be permitted to show cause against the grant of sanction for his contemplated prosecution. The learned District Magistrate failed in this case to give the petitioner notice of the application for sanction made to him: but, in my opinion, that omission, although it may have been improper, was not an illegality which wholly vitiated his order sanctioning the prosecution of the petitioner for an offence under S. 211, I. P. C.

Monoolal Sahu instituted criminal proceedings against the petitioner and Mahabir Sahu on 15th March 1919 under S. 211 read with S. 109, I. P. C. The petitioner was arrested owing to his non-appearance under a warrant and brought before the Court. The petitioner alleges that this was the first time that he became aware that sanction for his prosecution had been granted. The petitioner was admitted to bail and from time to time thereafter he seemed to re-

(1) [1887] 10 Mad. 232 (F. B.).

(2) [1903] 26 Mad. 592.

(3) [1896] 18 All. 358.

(4) [1905] 28 All. 142=2 Cr. L. J. 598.

(5) [1902] 4 Bom. L. R. 750.

(6) [1908] 30 All. 52=6 Cr. L. J. 396.

(7) [1886] 12 Cal. 58 (F. B.).

cognize that the Criminal Court was legally and properly seised of the prosecution against him, because he applied from time to time for adjournments and it was not until 14th May that an application was filed by the petitioner asking for time, when for the first time he expressed his intention to apply to the High Court to quash the order sanctioning his prosecution dated 7th January 1919. Eventually on 27th May the petitioner applied to two Judges of this Court, who directed that notice should issue with a view to setting aside the order of the District Magistrate and staying proceedings in the criminal matter pending the disposal of this application. In my opinion to grant this petition would serve no useful purpose. If indeed the sanction had been granted owing to some technical legal error, I would have yielded to the argument of Mr. Varma. However inasmuch as only a moral impropriety in the manner and method of procedure has been committed, I do not feel justified now, having regard to the very great lapse of time that has taken place, in staying the criminal proceedings that have been instituted from continuing, by setting aside the order sanctioning the petitioner's prosecution. In my opinion the petitioner acquiesced in the order that was made and between 6th April and 14th May he never suggested directly or indirectly that any infirmity attached to the order of the learned District Magistrate.

The petitioner seeks to justify his delay in apply to this Court from 6th April to 27th May on the ground that he was seriously ill. Beyond this loose and general statement referred to in the petition and corroborated by the affidavit to the petition, there is no evidence to show what was the ailment the petitioner was suffering from, nor has any medical evidence been adduced to show that the petitioner was in fact ill. Giving due consideration to the various topics addressed to me by the learned counsel appearing on behalf of the petitioner, I am satisfied that this is not a proper case in which I should set aside the order sanctioning the petitioner's prosecution. Accordingly I refuse this application.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 523

ATKINSON AND DAS, JJ.

Muneshwar Dutta—Plaintiff—Appellant.

v.

Kailash Pati and others—Defendants—Respondents.

First Appeal No. 124 of 1917, Decided on 14th March 1919, from decision of Sub-Judge, Saran, D/- 7th February 1917.

Civil P. C. (1908), S. 66—Mortgage decree—Purchase for judgment-debtor's benefit—Suit by judgment-debtor to recover property from purchaser is not maintainable.

A mortgage decree having been obtained against the plaintiff the latter came to a verbal arrangement with the decree-holder whereunder on payment of a certain sum the decree was assigned to one K. It was arranged that K should execute the decree and purchase the mortgaged property himself, but that on payment of a certain sum he should reconvey it to the plaintiff. In a suit by the plaintiff to enforce this agreement:

Held: that the suit was barred by S. 66.

[P 526 C 1]

Permeshwar Dayal—for Appellant.

Rai Tribhuvan Nath Sahai and Radha Radhesh Sinha—for Respondents.

Judgment.—This first appeal comes before us from a decision of the learned Subordinate Judge of Saran, dated 7th February 1917. The plaintiff claimed by his plaint that upon payment of a sum of Rs. 1,000 to the defendants, or such other sum as might be declared by the Court to be properly payable, the plaintiff may be declared entitled to and be restored to possession of the lands in suit and that the defendants may be required to execute in his favour a conveyance of 5 annas 7 pies odd kismat of Mauza Hasanpurva and 5 annas 4 pies kismat of Mauza Endawli bearing Tauzi No. 4987, being the lands forming the subject matter of this litigation. The learned Judge who tried this case dismissed the suit on a point of law, viz. on the ground that the suit was not maintainable, the same being barred by the provisions of S. 66, Civil P. C. The facts lie within a very narrow compass and may be stated shortly.

The plaintiff in the year 1899 executed a mortgage in favour of a man called Balchand Hajjam. Apparently the plaintiff was also indebted to many other Mahajans. Balchand as mortgagee obtained a decree against the plaintiff on 12th May 1899 for the sum of Rs. 1,697. A verbal arrangement was come to between the plaintiff and the nephew of the plaintiff's wife the present defendant 1, Kailash-

pati, with a view to arriving at a settlement in satisfaction of the mortgage decree which had been obtained against the plaintiff on 12th May 1899; the decree-holder being willing to accept in round numbers the sum of Rs. 1,500 in full satisfaction of his decretal debt. The terms of this verbal arrangement were that the plaintiff, as judgment-debtor, should pay the sum of Rs. 500 and the balance of Rs. 1,000 should be paid by defendant 1 to the decree-holder, and that he should assign to Kailashpati the mortgage-decree, and as such assignee Kailashpati should be entitled to execute the decree in the event of the plaintiff failing to pay the balance* ascertained to be due thereon. The decree was assigned by the original decree-holder to Kailashpati on 11th February 1903. On 6th August 1903 the decree so assigned to Kailashpati, nephew of the plaintiff, was executed by him, but prior to the execution of the decree it was agreed by the plaintiff on the one hand and Kailashpati on the other that the mortgaged property should be brought to sale in execution of the decree and that Kailashpati, the defendant, should by arrangement be declared the purchaser thereof upon the terms and understanding that the plaintiff should remain in possession of the mortgaged property, and that when the plaintiff paid to Kailashpati the sum of Rs. 1,000 or any other sum that might be found to be due on the foot of the decree, that then, and in that event, Kailashpati should assign by deed the title to the lands so purchased by him in execution of the decree to the plaintiff discharged from all liability under the mortgage decree.

On these facts the learned Judge was of opinion that this suit was barred by the provisions of S. 66, Civil P. C. The plaintiff in his plaint is very outspoken relative to the facts of this case and the nature of the agreements made between him and defendant 1. In para. 5 of the plaint it is alleged that the plaintiff was in the year 1899 indebted to many Mahajans and that one Balchand was endeavouring to acquire his property. The nature of the arrangement, which, it is alleged, the plaintiff had arrived at with his nephew Kailashpati as stated in the plaint indicates clearly that the intention of these two persons was to make an agreement which would in effect preserve

the plaintiff's property for the benefit of the plaintiff, while at the same time defeating the plaintiff's creditors' rights in realizing his (the plaintiff's) property and whereby they might satisfy and discharge the debts due to them. The plaintiff further alleges in his plaint that the verbal contract that was made between Kailashpati and himself with reference to the purchase of the property in suit was in fact what has been termed partly performed; because he, the plaintiff, remained in possession of the lands purchased by Kailashpati from the year 1903 up to December 1914, and that during this period of time half the rents and profits accruing from the lands in suit were applied and paid to Kailashpati as and for interest in respect of the money which he had advanced at the time that the decree was assigned to him by the original decree-holder; and the other half applied by the plaintiff for his own use and benefit.

The whole tenor of the plaint, which discloses the plaintiff's case, is that the transaction and agreement effected between Kailashpati and himself was for his (the plaintiff's) benefit and that Kailashpati was merely a colourable purchaser for the benefit of the plaintiff to enable him to defeat his creditors in the enforcement of their rights. S 66, Civil P. C., provides as follows:

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

This section is materially different from S. 317 of the prior Code, and in its result it comes to this: that no person can claim a title as against a certified purchaser at a sale in execution of a civil Court decree inasmuch as such certificate is made conclusive evidence of the title of such purchaser, and consequently no suit is entertainable in any Court framed or designed to impugn or qualify the nature of the interest acquired by such certified purchaser. The obvious intention of S. 66 of the present Civil Procedure Code is to strike at the root of what is generally known as benami transactions. Benami transactions are no doubt not illegal in themselves, but by the Civil Procedure Code the legislature intended that S. 66 should operate to prevent Courts of justice from granting

relief in aid of titles which were conceived in fraud and designed to hinder honest claimants in realizing and enforcing their rights and dues. The learned Judge who decided this case was emphatically of opinion that the plaintiff was not entitled to the relief he sought in this suit, inasmuch as the contract made between Kailashpati and himself was merely a colourable device which was never acted upon or intended to be acted upon; and in support of this view the learned Judge relies on the fact that the plaintiff from 1903 to December 1914 remained in possession of the property and never in any way sought to enforce the alleged contract as against Kailashpati, and that the whole transaction was a colourable pretence and sham.

It has been argued before us that this case does not come within the prohibitory provisions of S. 66, Civil P. C., inasmuch as it is merely a case in which the plaintiff seeks relief from this Court by way of specific performance of a contract referable to the purchase of land made between the plaintiff and the defendant. If that argument were well founded, in my opinion there would be no benami transaction that could not be readily effected and the provisions of S. 66 evaded and rendered inoperative and void. I can see a marked distinction between a case where a purchase of land is made, founded on an agreement which is designed to enable one person to purchase property ostensibly in his own name, but in reality and in fact for the benefit and advantage of another, and a case where a person honestly buys landed property for himself, but subsequently desires and agrees to sell the property to another. If the facts of each particular case justify the conclusion that the latter was the true tenor and nature of the agreement arrived at between the parties, then I would say that very possibly a claim based on such an agreement would be specifically performed by the civil Courts. However I am satisfied in this case, beyond any reasonable doubt, that the whole transaction, as disclosed by the plaintiff's plaint itself, was that Kailashpati was to buy the lands in suit nominally in his own name, but in reality and effect for the sole benefit of the plaintiff; and that the plaintiff was to be entitled to remain in possession of the lands, and upon payment of certain money secure

for himself a deed establishing his title to the lands in suit. The effect of this arrangement upon which the plaintiff relies to support his claim in this action is merely designed to go behind and to impugn the title of the defendant, who claims the lands in suit as purchaser by virtue of the certificate given to him at an auction-sale in execution of a civil Court decree.

Three cases have been cited before us in support of the plaintiff's contention, but really none of them afford any assistance in the light of the findings of fact arrived at in the present case. The first case is reported as *Sasti Churn Nundi v. Annopurna* (1). That case is clearly distinguishable in its facts from the present case and in that it was decided that the suit did not offend against the provisions of S. 317 of the old Code, which as I have already observed are essentially different to the provisions of S. 66 of the existing Code and wherein it was held that the plaintiff was entitled to succeed, inasmuch as his title was founded not on any agreement but by virtue of his long-continued possession of the lands then forming the subject-matter of suit in the case referred to. Another case is reported as *Karamuddin Hosain v. Niamut Fatehma* (2). There also the case was held not to be within the provisions of S. 317 of the prior Code, for the simple reason that the plaintiff in that case based his claim of title on long-continued possession of the lands in suit. However, on the further ground that case is also distinguishable as it would appear that the person against whom relief was sought in that case was not the certified purchaser within the meaning of S. 317.

Therefore that case also has no application to the facts of this case. The nearest case to the one before us is the case reported as *Kumara v. Srinivasa* (3). However, when that case is analyzed, it is quite clear that their Lordships decided that case only upon its own facts as disclosed by the plaint. The case was one for specific performance, and not one to which the provisions of S. 317 applied; that is to say the facts showed that the transaction was not one tainted with a benami character, and consequently it was held that specific relief might be

(1) [1896] 23 Cal. 639.

(2) [1892] 19 Cal. 199.

(3) [1888] 11 Mad. 213.

claimed and granted without infringing the provisions of S. 317, Civil P. C. That case also in its facts is distinguishable entirely from the present case before us. Accordingly, having given this matter our very best and most careful consideration and having listened attentively to the able arguments addressed to us on behalf of the plaintiff-appellant, we are satisfied that the learned Subordinate Judge was perfectly right in holding that this suit was not maintainable in point of law inasmuch as it contravened the express provisions of S. 66 of the present Civil Procedure Code. Accordingly we dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1919 Patna 526

ROE AND COUTTS, J.J.

Sheo Prasad Mander—Defendant—Appellant.

v.

Bateswar Mahton and others—Plaintiffs—Respondents.

Second Appeal No. 358 of 1918, Decided on 25th April 1919, from decision of Dist. Judge, Bhagalpore.

Civil P. C. (1908), S. 11—Rent suit—General rule is that decision in previous suit as to amount of rent is not *res judicata*—Suit on contract—Rate in issue in previous suit—Rule does not apply—Landlord and tenant.

The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of subsequent years, although it may give rise to a presumption that the rent remains the same. This rule does not however apply where the suit is based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit. [P 526 C 2]

Lalit Mohan Ghose—for Appellant.

Lachmi Narain Singh—for Respondents.

Judgment.—This second appeal arises out of a suit for arrears of rent for the years 1320 to 1323 in respect of 48 bighas 5 cottahs of land. This land was originally held by the defendant and others as occupancy tenants. They executed a mortgage with possession in favour of the plaintiffs for a sum of Rs. 1,000 and the plaintiffs took possession. Subsequently in 1909 the defendants took a lease of the same land, patta and kabuliyat being exchanged. The terms of the lease were that the defendants were to pay 70 maunds of wheat, value Rs. 225, to the plaintiffs as rent. The plaintiffs have accordingly sued at

this rate. The suit was decreed in the Court of first instance and in the lower appellate Court and against this decree the defendants have made this second appeal to this Court. The principal argument adduced on behalf of the defendants, or rather the single defendant who has contested the suit, is that the rent fixed in the lease was a money rent not a produce rent—and that consequently the defendants are entitled to the benefit of S. 48, Ben. Ten. Act. In the Court of first instance it was held by the learned Subordinate Judge that the defendants are not under-raiyats and that consequently S. 48, Ben. Ten. Act, did not apply. The learned District Judge on appeal however found that the defendants were under-raiyats and that they would have been entitled to the benefit of the section except for the fact that the rent was a produce rent and not a money rent.

We have examined the kabuliyat and are of opinion that the rent is a produce rent and not a money rent. It would therefore be immaterial whether the defendants are raiyats or under-raiyats. But whatever be the true effect of the kabuliyat, the plaintiffs are entitled to succeed. It appears that in 1912 they instituted a suit against these defendants for the rent of 1318 and 1319, at the rate at which they now claim, and obtained a decree. The general rule of law is that a decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of subsequent years, although it may give rise to a presumption that the rent remains the same, but this rule does not apply to a case of the kind now before us. The present suit is one based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit. That suit was between the same parties, the matters in dispute were decided by a Court of competent jurisdiction and it is not now open to the parties to re-agitate them. This was the view taken in *Rajendra Nath Ghose v. Taran gin Dasi* (1) and it has been followed in a long series of decisions. In this Court we may refer to the decision in *Mt. Zalika Bibi v. Mahant Krishna Dayal Gir* (2). It is true that there is a subsequent decision of this Court—

(1) [1905] 1 C. L. J. 248.

(2) [1917] 41 I. C. 778.

Bansraj Lal v. Moti Lal (3)—which might appear, at first sight, to conflict with the decisions we have referred to, but the case was an entirely different one and we do not find that the principle which is laid down in *Rajendra Nath Ghose v. Tarangini Dasi* (1) was dissented from. The case was a very peculiar one. The plaintiff was forced by the Court against his will to include certain plots in his plaint; he protested and stated that he intended subsequently to bring an action on this ground. It was held that the principle of estoppel in such a case would not apply. It is clear therefore that this was an entirely different case which has no bearing on the case now before us. We dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

(3) [1917] 42 I. C. 425.

A. I. R. 1919 Patna 527

ROE AND JWALA PRASAD, JJ.

Mohammad Abdul Karim—Plaintiff—Appellant.

v.

Mohammad Yusuf and others—Defendants—Respondents.

Appeal No. 205 of 1918, Decided on 29th April 1919, from order of Dist. Judge, Saran.

Practice—Appeal—Rejection for non-payment of deficit court-fee—Error in calculating amount—Second appeal is competent—Civil P. C. S. 96.

An order made by an appellate Court rejecting a memorandum of appeal for non-payment of deficit court-fee is appealable to the High Court, where such order proceeds upon an error in calculating the amount of the Court-fee payable.

[P 527 C 2]

Ganesh Dutt Singh—for Appellant.

Parmeshwar Dayal for *Khurshed Husnain*—for Respondents.

Judgment.—In this case the plaintiff-appellant sued for a declaration of his title in one-half of property valued at Rs. 2,100 and that upon an adjudication of his title he should be put in possession of his share after a partition by metes and bounds. The Court of first instance found as a fact that he was out of possession at the time of the institution of his suit. The court-fee on the suit having been Rs. 10 only, the Court of first instance thereupon recorded an opinion that the court-fee payable was ad valorem on Rs. 2,100. On appeal to the District Court a Court-fee of Rs. 10 only was paid. The Sheristadar of the Court

therefore recorded a note to the effect that the deficit court-fee payable was Rs. 130 in the lower Court and Rs. 130 in the Judge's Court, in all Rs. 260, whereupon the learned District Judge recorded an order that he should pay Rs. 240 within a week. This order was brought to contest on 23rd January 1918 but affirmed and an order made rejecting the appeal on the ground that the deficit court-fee had not been filed.

On 27th February 1918 conditional order was made restoring the appeal if Rs. 240 be paid within a week. Rs. 120 was paid on 14th March and nothing more having been paid by 5th April the appeal was dismissed. On the authority of the case of *Chandramani Koer v. Basdeo Narain Singh* (1) an appeal lies to this Court from an order rejecting a memorandum of the appeal if the Court below has made an error with regard to the category within which the suit falls. Clearly in this case an error has been made, for though in view of the prayer for a partition of the property in execution the subject-matter of the suit might be for the purposes of jurisdiction Rupees 2,100, yet the actual relief sought was valued at only Rs. 1,050 and therefore the court-fee payable in both the Courts below was Rs. 80 only. The deficit therefore in the learned Subordinate Judge's Court was Rs. 70 and in the District Court the proper court-fee had been filed by 14th March and accepted. It remained only under S. 12, Court-fees Act to call upon the appellant to pay the deficit then due, which would according to our calculation amount to Rs. 20, before the suit should be proceeded with. No opportunity was given to the appellant to make this deposit and it seems to us he has been seriously prejudiced by the errors made in the calculation of the court-fee due. We would therefore decree this appeal, and in lieu of the order of the District Court direct that the appeal be registered with discretion to the District Court to fix a date on which the deficit court-fee of Rs. 20 shall be paid and if upon that date the court fee is not paid to refuse to proceed with the appeal and dismiss it. We would make no order as to costs.

V.S./R.K.

Appeal decreed.

(1) [1919] 49 I. C. 442.

A. I. R. 1919 Patna 528 (1)

DAS, J.

Prayag Singh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 178 of 1919, Decided on 15th July 1919, against order of Sess. Judge, Monghyr, D/ 29th April 1919.

Penal Code (1860), S. 193 — Accused acting as witness to service of summons on S—S found to have died before institution of suit—Accused not proved to be aware that service was to be effected on S—Convictions held illegal.

In a rent suit summonses were issued to, amongst others, one S. Accused 1 identified a person as S, and the summons was served on him; accused 2 and 3 were witnesses to the service. It appeared however that S had died some years before the suit was instituted. The three accused were accordingly convicted of an offence under S. 193, I. P. C.

Held: that the conviction of accused 2 and 3 could not be maintained, as it was not proved that they were aware that service was to be effected upon S. [P 528 C 2]

Sami—for Petitioners.*Assistant Govt. Advocate* — for the Crown.

Judgment.—I am clearly of opinion that the conviction of petitioners 2 and 3 cannot be upheld. The facts are shortly these: There was a rent suit by one Hakim Mohammad Reza and others against Dahu, Sukar and others. It appears that Sukar had died long before this rent suit was instituted. Summons however on the defendants was served on 21st January 1918. Petitioner 1 was the identifier on whose identification summons was served on Sukar. Petitioners 2 and 3 were witnesses to the service of summons. They have all been convicted under S. 193, I. P. C. This Court refuses to interfere so far as petitioner 1 is concerned. The only question which I have to consider is whether the conviction of petitioners 2 and 3 can be upheld. I have already mentioned that petitioners 2 and 3 were merely witnesses to the service of summons. That does not imply that they were aware on whom service was to be effected. S. 192, I. P. C., provides as follows:

"Whoever causes any circumstances to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance,

false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said 'to fabricate false evidence.'"

Did petitioners 2 and 3 cause any circumstance to exist or make any false entry in any book or record, or make any document containing a false statement, intending that such circumstance, false entry or false statement might appear in evidence in a proceeding taken by law before a public servant as such? I am clearly of opinion that the answer cannot be in the affirmative. If indeed it had been proved that they were aware on whom service was to be effected, the matter would have stood on a different footing altogether. But that is not the finding of the Courts below, and so far as I have read the evidence and I have certainly examined some of the evidence in the case—oral and documentary—I do not find that it has been proved that they were at all aware of the fact that service was to be effected on Sukar. It may well be that the identifier told them that service was to be effected on some other person. Before these petitioners can be convicted of an offence under S. 193, it must, in my opinion, appear that they were aware that service was to be effected on Sukar. In my opinion their conviction under S. 193, I. P. C., cannot be sustained.

I therefore set aside the conviction and the sentence passed on petitioners 2 and 3.

V.S./R.K.

*Conviction set aside.***A. I. R. 1919 Patna 528 (2)**

DAS, J.

Teni Prasad Singh and others—Petitioners.

v.

Sarjoo Singh—Opposite Party.

Criminal Revn. No. 122 of 1919, Decided on 21st May 1919, against order of Deputy Magistrate, Patna, D/- 12th April 1919.

(a) Criminal P. C. (1898), S. 133—Essentials to confer jurisdiction pointed out.

In proceedings under S. 133, it is necessary to establish first that the act complained of is a nuisance or an obstruction; and secondly that it was committed in a public place which may lawfully be used by the public. [P 529 C 1]

(b) Criminal Trial—Bona fides is question of fact—Criminal P. C., S. 133.

The question of the bona fides of a claim is a question of fact which has to be inquired into like any other question of fact. [P 529 C 1]

Gour Chandra Pal—for Petitioners.

Hasan Imam and S. K. Banerji—for Opposite Party.

Judgment.—The petitioners complain against an order passed by a Magistrate of Patna requiring them to remove an obstruction on a public road which is survey plot No. 222. The petitioners deny that survey plot No. 222 is a public road and claim it as their *sahana*. In proceedings under S. 133, Criminal P. C., it is necessary to establish first that the act complained of is a nuisance or an obstruction and secondly, that it was committed in a public place which may lawfully be used by the public. It is admitted that a building has been put up on survey plot No. 222. So far as the second question is concerned the learned Magistrate has considered the evidence bearing on the point and has come to the conclusion that plot No. 222 is a public pathway which is or may be lawfully used by the public. It is urged however that the claim of the petitioners is a bona fide claim and that such a claim ousts the jurisdiction of criminal Courts. But the question of bona fides of a claim is a question of fact which has to be inquired into like any other question of fact: see *Nundo Gopal Chatterjee v. Kusum Kumar Banerjee* (1). The learned Magistrate has inquired into the question of bona fides and has recorded a finding adverse to the petitioners. In my opinion there is no substance in the application which must be refused.

V.S./R.K. *Application refused.*

(1) [1905] 1 C. L. J. 434.

A. I. R. 1919 Patna 529

ATKINSON, J.

Darogi Chamar and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 162 of 1919, Decided on 19th June 1919, against order of Sub-Divl. Officer, Bhagalpur, D/- 31st April 1919.

Criminal P. C. (1898), Ss. 367 and 427—Appellate Court must write reasoned and considered judgment, setting out facts, points or determination and stating grounds for

decision — Judgment omitting to do so is erroneous.

The law requires an appellate Court to write a reasoned and considered judgment, setting out the facts and points arising for determination and stating the reasons and grounds for its decision. A judgment which omits to do this, the Judge in appeal contenting himself with saying that he adopts the reasons given by the trial Court to support the grounds of his decision for maintaining the conviction of an accused person, is erroneous in form, as such a judgment cannot be read as supplementary or additional to, or to be explained and deciphered by the aid of, the judgment of the trial Court. [P 530 C 1, 2]

A. P. Upadhyaya—for Petitioners.

Judgment.—The five petitioners herein were charged with an offence under S. 411, I. P. C., viz., dishonestly receiving stolen property. It appears that three sacks of paddy belonging to the complainant were taken from his verandah by night and that on the following day two of the sacks were discovered in the house of accused 2, the paddy having been taken out from the sacks and divided into portions. The learned Magistrate of the Second Class, who tried this case, sets forth in his judgment very cogent reasons for showing that all the accused are guilty of an offence within the meaning of S. 411, I. P. C. The learned trial Magistrate considered the case and the evidence as against each accused, and he found that the taking of the sacks of paddy from the complainant's verandah by the petitioners was with the dishonest intention of appropriating complainant's property to the petitioners' use. On appeal the case came before Mr. Sircar, the Subdivisional Magistrate of Bhagalpore, and I confess that his judgment is, in my opinion, perfunctory in the extreme. S. 424, Criminal P. C., read with S. 367 provides what a judgment of an appellate Court should contain to be a judgment such as the law requires. S. 367 provides that it shall contain the point or points for determination, the decision thereon and the reasons for arriving at the decision.

Now the judgment of the Subdivisional Magistrate does not state the point or points arising for determination and the reasons for the decision at which the appellate Court has arrived. The learned Subdivisional Magistrate on appeal has not considered whether upon the evidence the taking of the bags by the accused was a taking by them dishonestly knowing that the same was stolen property, nor has the learned Subdivisional Magistrate

on appeal considered the weight of the evidence adduced at the trial as against each of the accused individually, and as to how far such evidence would warrant a conviction of each of the five persons charged in the appeal which he was called upon to determine. The ruling reported as *Ram Lal Singh v. Hari Charan Ahir* (1), in my opinion, applies in its reasoning with direct precision to the facts of the particular case now before me; and with the authority of that decision I venture to express my entire concurrence. Sir Lawrence Jenkins says:

"It is continually overlooked by Courts of appeal that S. 424, Criminal P. C., prescribes that the rules contained in Chap. 26 as to the judgment of a criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate Court, other than a High Court, and one of the sections in Chap. 26, S. 367, which prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon and the reasons for the decision. Now, the conviction in this case by the Court of first instance was both under Ss. 379 and 143. For the purpose of an offence under S. 379, it is necessary that it should be proved that there was an intention to take dishonestly any moveable property out of the possession of the person aggrieved without that person's consent; and one of the points for determination therefore is whether there was that intention. Admittedly there is no finding on that point in the judgment of the lower appellate Court. This is not a mere technical objection, because one of the points urged on the part of the defence is that, though there may have been there moving of property, there was not the intention to take that property dishonestly out of the possession of any other person, inasmuch as, it is contended, there was a bona fide claim of right; so that it is apparent that it was absolutely essential that that point should be contained in the judgment and that it should be decided."

The reasoning of that decision, in my opinion, applies with striking force to the facts of this case. The learned Subdivisional Magistrate in appeal contents himself with saying that he adopts the reasons given by the trial Court to support the grounds of his decision for maintaining the conviction of all the accused on appeal. In my opinion such a judgment is quite erroneous in form. The judgment of the appellate Court must stand by itself and cannot be read as supplementary or additional or to be explained and deciphered by aid of the judgment of the trial Court. Authority for this proposition is to be found in *Jamait Mullick v. Emperor* (2). And in this

Court also I think the reasoning of a decision reported as *Gurubari Behera v. Emperor* (3) would apply, viz., that the law requires an appellate Court to write a reasoned and considered judgment setting out the facts and points arising for determination and stating the reasons and grounds for its decision.

In my opinion the learned Subdivisional Magistrate has failed to discharge the duty which the law cast upon him. The case must be remanded to him so that he may write a proper judgment upon the facts and evidence, and I should like him to state also his reasons for reducing the sentence of six months passed by the trial Court to a period of three months' rigorous imprisonment against each of the accused. If the learned Subdivisional Magistrate was honestly satisfied that the reasoning of the trial Court was satisfactory and convincing, it is hard to understand how he came to reduce the sentence in the manner in which he did. However I shall remand the case to the learned Subdivisional Magistrate to enable him to write a proper judgment in accordance with law. As the accused are on bail, let them remain on bail pending a proper judgment being prepared by the Subdivisional Magistrate.

v.S./R.K. Case remanded.

(3) [1918] 2 P. L. J. 695=43 I. C. 439.

A. I. R. 1919 Patna 530

MULLICK, J.

Emperor

v.

Makund Patel—Petitioner.

Criminal Ref. No. 16 of 1917, Decided on 24th April 1917, by Sess. Judge., Manbhum-Sambalpur.

Criminal P. C. (1898), Ss. 4 (h), 203 and 476—Information reported by police to be false—Complainant asking for judicial inquiry—His application amounts to complaint—Magistrate dismissing complaint and directing complainant's prosecution—Procedure is legal.

Where an information is reported by the police to be false and the complainant asks for a judicial inquiry into the charge made by him his application amounts to a complaint within the meaning of S. 4, (h) and the proper mode of dealing with it is to examine the complainant on oath and to dispose of the application as a complaint under the procedure indicated in Ch. 16, of the Code. Petitioner preferred a charge of dacoity before the police and on the police reporting that the charge was maliciously false, the petitioner asked for a judicial inquiry. The Magistrate thereupon examined him on oath and as the latter failed to produce any evidence to substan-

(1) [1910] 37 Cal. 194=5 I. C. 999=11 Cr. L. J. 248.

(2) [1908] 35 Cal. 138=6 Cr. J. 427.

tiate the charge, dismissed the complaint under S. 203, Criminal P. C. and under S. 476 of the Code directed his prosecution for an offence under S. 211, I. P. C.

Held: that the application made by the petitioner asking for a judicial inquiry amounted to a complaint and that the Magistrate being seised of the case had jurisdiction to direct the prosecution of the petitioner, the offence having been brought to his notice in the course of a judicial proceeding. [P 531 C 2]

Manohar Lal— for the Crown.

Judgment.—This reference has been made by the Sessions Judge of Manbhum-Sambalpur asking us to set aside the proceedings taken under S. 476, Criminal P. C., against one Makund Patel for his prosecution under S. 211 and 182, I. P. C., for preferring a false charge of dacoity before the police. It appears that after the police reported the information given by the complainant to be maliciously false a notice was issued upon the complainant by the Deputy Magistrate of Sambalpur calling upon him to show cause why he should not be prosecuted for making a false charge. The complainant appeared and filed a petition before the Deputy Magistrate asking for a judicial inquiry. On 9th January 1917 the Deputy Magistrate found the complainant absent and called upon him to appear and substantiate his case by evidence. On 20th January the Deputy Magistrate examined the complainant on oath, but the complainant had no evidence to adduce and was unable to take any steps to prove his case. The Deputy Magistrate then dismissed the complaint under S. 203, Criminal P. C., declared it to be maliciously false, and sent the complainant to the Sub-divisional Magistrate for trial for an offence under S. 211, I. P. C., The language used by the learned Deputy Magistrate is somewhat inaccurate, for he says in one part of his order that he sanctions the prosecution of the complainant. It is quite clear however that the Deputy Magistrate intended to proceed under S. 476, Criminal P. C., and not under S. 195. The complainant thereupon moved the Sessions Judge of Manbhum-Sambalpur in appeal, but that officer finding that no appeal lay against an order under S. 476, Criminal P. C., has treated the application as one for revision and referred the case to us under S. 438, Criminal P. C.

The main ground upon which a reference is made is that the application of the complainant to the Deputy Magis-

trate asking for a judicial inquiry was not a complaint and that although it was open to the Deputy Magistrate taking cognizance of the police report to direct a prosecution under S. 211, I. P. C., upon the police report itself, that procedure has not been followed in this case and that the proceedings purporting to be founded upon a judicial proceeding before the Deputy Magistrate are without jurisdiction inasmuch as there were no judicial proceedings in that Court. Now whether the learned Deputy Magistrate in taking proceedings under S. 476, had jurisdiction, depends upon whether the matter came under his cognizance in the course of judicial proceedings. If the application made by the complainant for a judicial inquiry was a complaint, then there were judicial proceedings of which the learned Deputy Magistrate was seised. I am unable to appreciate the grounds on which the learned Sessions Judge considers that the application of the complainant is not a complaint within S. 4 (h), Criminal P. C. It has been repeatedly held that applications of this nature are complaints and that the proper mode of dealing with them is to examine the complainant on oath and to dispose of the application as a complaint under the procedure indicated in Ch. 16, Criminal P. C. In my opinion the view taken by the learned Sessions Judge is contrary to law and unsupported by any authority and the reference must be disallowed. The proceedings against the complainant are good in law and the prosecution will proceed.

V.S./R.K. *Reference disallowed.*

A. I. R. 1919 Patna 531

ATKINSON, J.

Balak Mahton and another—Defendants—Appellants.

v.

Mathura Ram Dubey and others—Plaintiffs and Defendants—Respondents.

Second Appeals Nos. 20 and 21 of 1918, Decided on 13th June 1919, from a decision of Dist. Judge, Shahabad.

(a) Bengal Land Registration Act (7 B. C. of 1876), S. 78—Nonregistration as recorded proprietor is merely impediment to recover rent by a decree.

Nonregistration of a person as the recorded proprietor of land in accordance with the provisions of S. 78 is not a disqualification which would deprive him of a cause of action; it is merely an impediment against his right to re-

cover rent by a decree until the provisions of S. 78 are complied with. [P 532 C 2]

(b) **Bengal Land Registration Act (7 B. C. of 1876), S. 78—Non-registration as a proprietor up to the date of first Court's decree—Registration prior to decree of District Judge in appeal cures defect.**

Where a plaintiff in a suit for rent was not registered as the recorded proprietor up to the date of the first Court's decree in his favour, but was so registered prior to an appeal to the District Judge :

Held : that he was entitled to the benefit of a decree from the District Judge if the facts otherwise justified a decree being granted in his favour. [P 532 C 2]

(c) **Bengal Tenancy Act (8 B. C. of 1885), S. 71 (4)—Removal of crops by tenant without proper appraisement—Landlord is entitled to full measure of crop.**

Section 71, Cl. 4, contemplates that, where tenants remove a crop without having the same properly appraised, a presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character for that harvest.

[P 533 C 1, 2]

D. N. Sirkar—for Appellants.

Huda and Jatendra Nath Gupta—for Respondents.

Judgment.—The plaintiffs sue to recover from defendants 1, 2 and 3 rent on the danabandi system for the years 1320 and 1323. The plaintiffs are four in number and are cosharers, as landlords, in respect of the lands in suit. Pro forma defendants 4 and 5 are the other cosharer landlords of the plaintiffs. It is stated as between the respective landlord cosharers that the collection of their respective shares of the rent has been separated. The main argument advanced by the defendants why the plaintiffs should not succeed in obtaining a decree for the rent claimed in this suit is that the plaintiffs were not at the time of the institution of the suit registered in the Collectorate under the provisions of S. 78, Land Registration Act. S. 78, Land Registration Act, provides :

"No person shall be bound to pay rent to any person claiming such rent, unless the name of the person claiming the rent shall have been registered under the Land Registration Act."

The defendants contend that the plaintiffs were not duly registered in accordance with the provisions of the Land Registration Act prior to the institution of this suit. This point was suggested before the learned Munsif who tried the case ; but I gather from the form of his judgment that it was not seriously pressed in argument before him. However in the lower appellate Court a different attitude was adopted by the

defendants and the point as to nonregistration of the plaintiffs as the recorded proprietors in the Collectorate prior to the institution of the suit was strenuously pressed before the learned District Judge. Up to the time that the Munsif granted a decree for rent claimed in favour of the plaintiffs as against the defendants, the plaintiffs were not registered in accordance with the requirements of the Land Registration Act. Therefore the learned Munsif in my opinion ought not to have awarded the plaintiffs a decree. The plaintiffs and the defendants respectively appealed to the learned District Judge, and pending the determination of the appeal the plaintiffs complied with the provisions of S. 78, Land Registration Act, and had themselves recorded as proprietors of the lands in suit in the Collectorate.

The learned District Judge was of opinion that nonregistration was not a disqualification which in point of law would be deemed to deprive the plaintiffs of a cause of action; but that it was merely an impediment against their right to recover the rent they claimed by a decree until the provisions of the Registration Act were complied with, and that thus inasmuch as the plaintiffs prior to the appeal to the District Judge were duly registered and recorded as proprietors of the lands in suit that therefore they were entitled to the benefit of a decree from the learned District Judge, if the facts otherwise justified a decree being granted in their favour. With the view I agree. It appears to me that the law on this point is covered by express authority which will be found in the rulings reported as *Alimuddin Khan v. Hira Lal Sen* (1), *Abul Khair v. Meher Ali* (2), *Pramada Sundari Debi v. Kanai Lal Shaha* (3) and *Belchambers v. Nawab Sir Syed Hussan Ali* (4), and in addition there appears to me to be an authority in this Court to support the contention that even after the trial Court has granted its decree, it would be open to the landlord seeking to recover rent to comply with the terms of S. 78, Land Registration Act, and to have his name recorded so as to be entitled to a decree from the appellate Court even though

(1) [1896] 23 Cal. 87 (F.B.).

(2) [1899] 26 Cal. 712.

(3) [1900] 27 Cal. 178.

(4) [1898] 2 C. W. N. 493.

the decree of the trial Court may have been illegal. The ruling reported as *Narain Prosad v. Gaji Mahton* (5) appears to me to lead to this conclusion in point of law.

I agree with the learned Judge in thinking that the learned Munsif should not have awarded the plaintiffs a decree in this case. The learned Judge was justified in appeal in granting the plaintiffs a decree, the plaintiffs having complied with the law as to registration. This disposes of the main contention addressed to me on the part of the defendants-appellants. It is conceded that on the question of payment no point can arise in second appeal; the finding of fact by the learned Judge that no payment of rent was in fact made by the tenants is a conclusive finding of fact by which I am bound. The rent claimed by the plaintiffs for the years in suit is a rent according to the danabandi system. The rent has since been commuted into a cash rent; but prior to the institution of the suit the danabandi system prevailed, and applies to the years for which rent is sought to be recovered.

Both the trial Court and the first Court of appeal were unable to assess the value of the crop owing to the crop having been cut and removed by the defendants, and consequently means did not exist of actually appraising the value of the crop as between the plaintiffs on the one hand and the defendants on the other; and therefore both the Courts adopted the system of taking an average between the figures stated by the plaintiffs and by the defendants respectively as to the actual value of the crop as the basis upon which the plaintiffs should be entitled to recover the rent due. Strictly speaking, in point of law I think this was an erroneous method for the Courts to have adopted; but it is difficult to see what either of the Courts could have done; having regard to the fact that the crop which required to be appraised had been removed by the defendants rendering the appraisement impossible by reason of their conduct, which conduct might amount to a criminal offence under certain conditions. I do not think the plaintiffs should be allowed to suffer by reason of the wrongful conduct of their tenants; and S. 71, sub-S. 4, Ben. Ten. Act, seems to me contemplate that where

tenants do remove a crop without having the same properly appraised that the presumption arises against them and the landlord is entitled to the full measure of the crop as of the best crop in the neighbourhood of a similar character for that harvest. This system of valuation was not adopted by either of the Courts below; as I have pointed out, the average was applied. The result no doubt is probably fair and reasonable as between the parties; but it would be quite senseless and futile to remand the case for further consideration as to the value of the crop, inasmuch as the crop has long ceased to exist and no good can be gained by any attempt to remand and reopen the case now for further consideration. Accordingly I will dismiss these appeals but without costs owing to the very defective way in which the plaintiffs presented their case in these appeals.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 533

ROE AND COUTTS, JJ.

Bhekdhari Singh and others—Plaintiffs—Appellants.

v.

Bajnath Goenka and others—Defendants—Respondents.

Appeal No. 360 of 1918, Decided on 28th March 1919, from appellate decree of Dist. Judge, Monghyr.

Mortgagor and Mortgagee—Mortgage by various mortgagors of several properties—Sale directed in certain order—Sale-proceeds of one property sufficient to satisfy debt—Decision does not mean that other mortgagors are released from liability to contribution.

Where in a mortgage suit involving several mortgages by various mortgagors, the Court decides that the properties should be sold in a certain order, the decision does not mean that in the event of the decretal amount being satisfied by the sale of one property only the remaining mortgagors are released from all liability to contribute to the mortgagor whose property alone has been sold. Before it can be held that the properties have been so released, there must at least be in the previous proceedings an indication of an intention in the mind of the Court to release them from such liability. [P 534 C 1]

Kulwant Sahay and Lalit Mohan Ghose—for Appellants.

Naresh Chandra Sinha, Bankim Chandra Mitter and Amir Hasan—for Respondents.

Judgment.—It is not necessary to set down in full the facts of this case for it

(5) [1917] 2 P. L. J. 701=42 I. C. 838.

is, in our opinion, necessary that there should be a remand. The grounds upon which the learned Judge has dismissed the plaintiff's suit are that in the original suit upon a mortgage it was decided that the properties should be sold in a certain order, and he takes that as a justification for the proposition that by that decision the liability of the various mortgagors was settled, the intention being that if the sale of the property of one of the mortgagors satisfied the decree, the property of the remaining mortgagors should be released from all liability whatsoever. It is by no means clear that there was in the decision of the Courts in the suit upon the original mortgage any such intention.

It may be that the Courts trying a mortgage suit may think it equitable that if one property is sufficiently valuable to satisfy the mortgage, the sale of other properties should be avoided but a direction to this effect is not necessarily a decision that all claims to contribution as between the various mortgagors will hereafter be barred. If the Transfer of Property Act be alone considered the only circumstance justifying the release of properties covered by a mortgage from bearing each its share of the liability under the mortgage is that as between the parties to the mortgage there has been a contract to the contrary. We doubt very much whether a Court trying the suit on the mortgage could enter into any question of liability to contribution in the event of one of those properties being in the end called upon to bear the whole burden. The case cited by the learned Judge *Satya Kripal Bandopadhyaya v. Gopi Kishore Mandul* (1), is based upon entirely different circumstances. The learned Judges were of opinion that in the litigation upon the mortgage itself the parties had by arrangement allowed the whole liability to rest on one property in the event of that property being able to bear the whole burden. There was certainly nothing in the nature of an agreement in the litigation upon the mortgage in the case before us. We must therefore remand this case for retrial. It has been dismissed on the preliminary issue, and we do not think that the reasons given for that dismissal were correct. At the same time we do not wish to fetter any

Division Bench before whom this case may come hereafter, by any detailed expression of our views upon the law, and would say only that before it can be held that the properties have been released from all liability to contribute, there must at least be in the previous proceeding an indication of an intention in the mind of the Court to release them from such liability. The Court of first instance will primarily be required to ascertain what was the value of each of the properties mortgaged at the time of the mortgage transaction. It will then ascertain what sum was paid by whom to satisfy the mortgage and will call upon the various properties to contribute in proportion to the values ascertained unless it be found that there was an agreement to the contrary, or a clear decision in previous litigation to the contrary, or other equitable reasons for releasing them from liability.

The decree made by the District Court is set aside and the case remanded for retrial. The appellants are entitled to a refund of the court-fee paid on this appeal.

V.S./R.K.

Case remanded.

A. I. R. 1919 Patna 534

ATKINSON AND COUTTS, JJ.

Ramprasad Mahton and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 73 of 1919, Decided on 1st April 1919 against order of the Sess. Judge, Patna, D/- 24th February 1919.

(a) **Criminal Trial—Duty of Court—Rioting and causing grievous hurt—Prosecution story as to rioting disbelieved in appeal—Residue of evidence should be examined with care for finding criminal responsibility of accused for injury caused.**

Where the Judge of an appellate Court finds that the case put forward by the prosecution is untrue to the extent that he is not inclined to believe the prosecution story of "rioting and loot", it behoves him to examine the residue of the evidence with care and scrutinize the same with caution for the purpose of considering the criminal responsibility of the accused for injuries alleged to have been inflicted. [P 536 C 1]

(b) **Criminal Trial—Duty of Court—Prosecution story believed to be in substance unfounded—Judge can in his discretion determine whether he believes witnesses.**

It is for the Judge acting as a juror, within his discretion, to determine whether he believes the evidence of the witnesses upon whom he is asked to rely in convicting the accused, even

(1) [1902] 6 C. W. N. 583.

though he may have believed that the prosecution case in substance was partly unfounded.

[P 536 C 1]

(c) Penal Code (1860), S. 103—Principle of self-defence explained.

Where in a case of robbery the owner of the property causes the death of one of the robbers, the causing of death may, according to the Penal Code, be justified as an act done in reasonable and necessary self-defence under certain circumstances and conditions, but in such cases the measure of self-defence must always be relevant and proportionate to the quantum of force used and which it is necessary to repel. The Penal Code however does not provide that in every case where a robbery is committed, the person attacked is entitled to cause death. It means no more than this: that robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker and that if in the exercise of that right death is caused, it may be justified if it is reasonably and properly asserted in defence of property.

[P 537 C 1]

(d) Criminal P. C. (1898), S. 439—Findings of fact are binding—But Court can enter into investigation of facts of case

An a general rule it is not within the province or function of a High Court acting as a Court of revision to dispute findings of fact fairly and properly arrived at by the trial Court, but there is nothing to preclude it from entering into an investigation of the facts of the case if it chooses to do so. Each case must depend upon its own facts.

[P 536 C 2]

Manuk and Nawal Kishore Prasad—for Petitioners.

Manohar Lall—for the Crown.

Judgment.—This is an application in criminal revision from the judgment of the learned District and Sessions Judge of Patna. The accused Bulak Mahton and Ram Prasad Mahton were charged jointly with others with offences under Ss. 326, 148, 379 and 114, I. P. C. The accused were acquitted of the charges preferred under Ss. 148, 379 and 114, but were convicted under S. 326, and the learned Judge awarded to each of them the punishment of 18 months' rigorous imprisonment, coupled with a fine of Rs. 250. The case presented by the prosecution was that the accused were two of a number of tenants residing in the village of Netar; and that their landlords, Hasan and Hussain, had treated their tenantry with great hardship and that the tenants by reason of the ill-treatment which they received from their landlords had formed themselves into a body to enforce certain rights and privileges; and that in consequence of the position taken up by the tenants their landlords were forced to lease the lands to a thicadar under a lease dated 19th April 1918; that the lease was made to

three persons of whom Deo Saran Mahton was the chief. It is alleged that these lessees were of the Kurmi caste; and that the alleged object of making this letting to such persons was by severity of dealing to force obedience from the tenants of the village of Netar to the will and behests of their zamindars.

It is alleged that on the night of 6th May when the crop had been taken to the Khalian, that the lessee or thicadar, Deo Saran Mahton, went there with his headman and others and endeavoured to take his share of the crop which had been gathered in the khalian, the night being dark, that a crowd of the tenants assembled and attacked Deo Saran Mahton and his party and inflicted considerable injuries on Ram Jiwan. The prosecution case is based on the assertion that the thicadar and his party were innocent people exercising a lawful right in protection of their property; and that they were assailed by the accused and their party who were tenants of this thicadar for the time being, and actuated by much hostility towards him. On the other hand the case put forward on behalf of the defence is that the accused and the other tenants in this village were in their khalian protecting their crops, and that the thicadar and his party made a raid upon the khalian for the purpose of forcing a distribution of the crop in accordance with the terms and conditions dictated by the thicadar. That an assault as a result took place and that the accused with others were attacked and that in defending themselves they were forced to inflict injuries upon their assailants and they claim that in acting as they did, they acted in assertion of their right of necessary self-defence. It is true that the parties appear to have been armed, some with lathis and some with more deadly weapons. Owing to the state of feeling that existed between the tenants and the thicadar there was probably an apprehension of an attack by one side upon the other, and for this reason lathis were ready to hand in the event of an attack maturing and eventually being set in motion. The main ground on which the judgment of the learned Sessions Judge of Patna is impeached, by Mr. Manuk appearing on behalf of the accused, is that the learned Judge disbelieved in part the prosecution case and that he should have acquitted the

prisoners on all the charges preferred against them, even in respect of the charge under S. 326, for having inflicted grievous hurt on Ram Jiwan, and the learned counsel contends that the principle of law applicable to the facts of this case and similar cases is to be found enunciated in the decision of a case in this Court reported in *Phatali Singh v. Emperor* (1).

It is true to say that the learned Judge does find that the case put forward by the prosecution was untrue to the extent that he was not inclined to believe the prosecution story "of rioting and loot." No doubt when the learned Judge arrived at that conclusion it behoved him to examine the residue of the evidence with care and to scrutinize the same with caution. Having disposed of the case of rioting and loot, the learned Judge applied his mind for the purpose of considering the criminal responsibility of the two accused prisoners for the injuries received by Ram Jiwan, which charge formed part of the case of the prosecution. The learned Judge has dealt with this matter and has analyzed the evidence of the respective witnesses who have deposed to the fact that they saw the accused strike the injured man, Ram Jiwan, who had upon his body no less than 15 injuries, some of a very grave and serious character, and the learned Judge in arriving at the conclusion that the accused were responsible at least for some of the injuries inflicted on Ram Jiwan, came to a finding by which we are usually bound in criminal revision. The learned Judge analyzed the evidence on this issue carefully and cautiously and adds that

"this evidence is sufficient and there is no adequate reason for disbelieving it."

It was for the learned Judge acting as a juror within his discretion to determine whether he believed the evidence of the respective witnesses upon whose testimony he was asked to rely in convicting the accused, even though he may have believed that the prosecution case in substance was partly unfounded.

The case referred to by Mr. Manuk of *Thakur Rai v. Emperor* not reported yet, was a case of a criminal appeal to this Court, and not an application in

(1) [1918] 47 I. C. 73=19 Cr. L. J. 877.

revision. The present application made to us is one in revision. The case reported as *Phatali Singh v. Emperor* (1) was a case in revision; but in that case I understand our learned brothers, as they were entitled to do, entered into an investigation of the facts of that particular case. I agree with the general proposition laid down by the authority of the decision cited, with this addition that each case must depend upon its own facts as to the applicability of the general principle stated.

However in my opinion, if the case referred as *Phatali Singh v. Emperor* (1) laid down what is contended for that in every case where a Judge finds the Crown case to be substantially untrue although there is a residuum of evidence of the prosecution case with regard to some other charge incidental to the main charge against the accused, which the learned Judge accepts after careful judicial inquiry to be true and trustworthy, that nevertheless the accused must be acquitted even on this charge also because on the main charge the learned Judge disbelieves the theory advanced in support of the prosecution and that by no possibility is the learned Judge entitled to convict in respect of such charge, the evidence in support of which he believes I feel myself unable to agree with it. I do not believe that the case cited did any more than lay down a mere general proposition which speaking generally everybody universally accepts; but its application must depend upon the facts of each case.

I hold that Mr. Ross was the person to determine whether or not the witnesses Muneswar Singh and Dhanukdhari were credible witnesses upon whose testimony he felt he could safely rely in convicting the accused under S. 326. The learned Judge saw the witnesses, he heard the whole case, he knew full well the nature of the case he was trying, and he accepted the evidence of these witnesses and in criminal revision it is not, generally speaking, within our province or our function to dispute findings of fact fairly and properly arrived at by the trial Court.

Exception has been taken to the observations of the learned Judge with regard to his view of the law as to the right of self-defence.

A. I. R. 1919 Patna 537

DAS, J.

Lachmi Sahu—Plaintiff—Appellant.

v.

Radha Krishna Sahu—Defendant—Respondent.

Second Appeal No. 1282 of 1917, Decided on 14th April 1919, from decision of Dist. Judge, Saran.

Adverse possession—Joint tenants—There must be assertion of hostile title to their knowledge.

The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant until there is an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. [P 528 C 1, 2]

Rajendra Prasad—for Appellant.*Ram Prasad*—for Respondent.

Judgment.—On 5th July 1915 the plaintiff, who is the appellant before me, filed the suit out of which this appeal arises, for partition of the house and premises mentioned in the plaint; the plaintiff's case being that he was entitled to a 12-annas interest therein and that the defendant was entitled to 4-annas interest therein. The defendant resisted the suit on two grounds: firstly, on the ground that the plaintiff had no title to the property; and secondly, on the ground that the plaintiff's suit was barred by limitation. The facts admitted or found by the lower appellate Court are the following:

The house in question belonged to one Partap Narain Gir, who mortgaged the house to the plaintiff's father and the defendant's father jointly in the proportion of 12-annas to the plaintiff's father and 4-annas to the defendant's father. The suit was brought by the plaintiff's father and the defendant's father on the foot of the mortgage against Partap Narain Gir and they obtained a mortgage decree in that suit. They jointly executed the mortgage decree and purchased the house jointly and obtained possession in their joint names on 3rd July 1903. It would seem therefore that the plaintiff and the defendant are jointly entitled to the house and premises in suit, but it is the defendant's case that the plaintiff's father had borrowed Rs. 49 on a simple bond from the defendant's father and that in lieu of this debt and in consideration of the defendant's father bearing all the expenses of the mortgage suit the plaintiff's father gave up in favour of the defen-

Mr. Manuk contends that inasmuch as the object of the prosecution really was to attack the tenants, of whom the accused were two, for the purpose of robbery, therefore the right of defence vested in the accused of exercising force which would even justify the causing of death.

No doubt in the case of robbery, according to the Indian Penal Code, the causing of death may be justified as an act done in reasonable and necessary self-defence under certain circumstances and conditions; but in such cases the measure of self-defence must always be relevant and proportionate to the quantum of force used and which it is necessary to repel. But the Indian Penal Code does not provide that in every case where a robbery is committed the person attacked is entitled to cause death. It means no more than this, that robbery by violence may be resisted by violence sufficient to overcome the force employed by the attacker and that if in the exercise of that right death is caused it may be justified if it is reasonably and properly asserted in defence of property.

The learned Judge finds that the accused had not adduced any evidence which could justify by way of self-defence the infliction of the severe wounds from which Ram Jiwan suffered. I cannot think that the learned Judge erred in any sense in applying the law to the facts of this case, and we are satisfied on the entire case that the conviction of the accused by the learned Judge was right and proper and that it cannot be impeached in this Court in revision.

Mr. Manuk has applied to us to exercise our discretion in mitigating the punishment which has been awarded by the learned Judge. The accused have each been convicted and awarded a period of rigorous imprisonment of 18 months coupled with a fine of Rs. 250.

Yielding as we do to the application made by Mr. Manuk, we reduce the sentence of imprisonment in each case to one of 12 months' rigorous imprisonment; but the sentence of fine will stand.

The application is therefore allowed in a modified form qua the reduction of sentence.

V.S./R.K.

Application allowed.

dant's father all his right in the mortgaged property. The lower appellate Court has come to the conclusion that the defendant has not been able to prove this part of the case. The learned vakil appearing on behalf of the respondent says that the whole story has not been disbelieved, but that only a portion of it has been found by the lower appellate Court not to have been established by him. It is true that the lower appellate Court says nothing as regards the case made by the defendant that his father bore all the expenses of the mortgage suit, but the story was one and entire, and in my opinion, this portion of the story could not be separated from the other portion in which the defendant set up a bond executed by the plaintiff's father in favour of the defendant's father. So far as the bond is concerned, the lower appellate Court has given cogent reasons for coming to the conclusion that it has not been established. That finding is, of course, binding on me and I think that the lower appellate Court has rejected the whole of the defendant's case on this point.

That being so, it must be held that the plaintiff and the defendant acquired a joint title to the house in question and were the joint owners in respect thereto. The lower appellate Court has however dismissed the plaintiff's suit on the ground that the defendant has been in exclusive possession of the house and premises ever since the purchase of the house in the joint names of the plaintiff and the defendant. That finding is again binding on me in second appeal; but, in my opinion, it does not dispose of the appeal. For the purpose of this argument it must be remembered that the plaintiff and the defendant were joint owners, or, what would be called in England, tenants-in-common with respect to this house. It has been pointed out by Wilson, J., in a very celebrated case, *Mohomed Ali Khan v. Khaja Abdul Gunny* (1), that many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. This view is founded upon the well-established principle that the possession of one joint tenant is possession of all and that there is no dispossession

until there is an assertion of a hostile title to the knowledge of the co-owner sought to be excluded from the joint property. The question was debated in the case of *Ahmad Raza Khan v. Ram Lal* (2), where Champier, J., came to the conclusion on a review of the authorities that possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession. Where a co-owner in possession did not deny the title of the other co-owners till shortly before the institution of the suit and never laid claim to more than his share, it was presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co-owners.

That being so, it is clearly not sufficient for the lower appellate Court to dismiss the plaintiff's suit on the finding that the defendant has been in exclusive possession of the property ever since its purchase. The learned vakil appearing on behalf of the respondent has pressed on me the use of the words "exclusive possession" appearing in the judgment of the lower appellate Court. I take that finding to mean that the defendant has been, so far as he is concerned, in possession of the property ever since its purchase, but it does not mean that there has been an assertion of a hostile title by him to the knowledge of the plaintiff. On this question unfortunately there is no finding as to when the defendant first asserted a hostile title to this house to the knowledge of the plaintiff. All that we get from the judgment is that in 1908 the plaintiff demanded rent from the defendant and that the defendant sent a reply denying the plaintiff's title and setting up the same case as has now been put forward by the defendant. Therefore there was undoubtedly an assertion of a hostile title in 1908, but that, of course, is not sufficient for the accrual of a title by adverse possession. But the learned vakil on behalf of the respondent says that the question should be investigated by the lower appellate Court from this point of view, and I think he is right. It may be that on a consideration of all the evidence, the lower appellate Court may come to the conclusion that there was an assertion of a hostile title from

(2) A. I. R. 1915 All. 30=37 All. 203=26 I. C. 922.

(1) [1883] 9 Cal. 744 (F.B.).

the beginning, and, I think, having regard to the fact that there is no definite finding on this point, I cannot in this appeal give a decree to the plaintiff for partition of the house and premises.

Another point that has been argued before me is that under the guise of a partition suit, the plaintiff has asked the Court to adjudicate on a question of title between him and the defendant. The plaintiff's suit is a very simple one. He says that the defendant and I purchased the property and we have all along been in joint possession. Therefore I asked for partition. I have come to the conclusion that his allegation as to his title is correct. Therefore it is the defendant who raised the question of title in the suit. But, having regard to the fact that there was undoubtedly an assertion of a hostile title by the defendant certainly in 1908 and that there was a dispossession, I think it was necessary for the plaintiff to sue for possession as well as for partition, because it is well established that there must be unity of title as well as of possession to entitle the plaintiff to maintain an action for partition. Therefore, strictly speaking, the plaintiff's suit should have been a suit first of all for joint possession and then for partition. This only, in my opinion, affects the question of court-fees payable by the plaintiff on his plaint. Another matter which was argued on behalf of the respondent as a preliminary point was that this appeal was not brought within time.

It appears that the memorandum of appeal was filed on 31st October 1917 with copies of the judgment but without a copy of the decree. The decree was filed on 1st November and therefore the appeal was out of time by one day. The appellant says that the lower Court opened on the same day on which the High Court opened and he could not procure the copy of the decree within time. I am empowered under the Act to extend the period and I think in the circumstances of the case it should be extended. The result is that this case must go back to the lower appellate Court to be disposed of according to law. The appellant is entitled to the costs of this Court. Costs of the Courts below will abide the result and will be disposed of by the lower appellate Court. This decree will be drawn up upon payment by the plain-

tiff of the proper court-fees payable on a suit for possession and partition.

V.S./R.K.

Case sent back.

A. I. R. 1919 Patna 539

DAS, J.

Shiva Narain Ram and others — Defendants—Appellants.

v.

Mt. Phuljharra and others—Plaintiffs—Respondents.

Appeal No. 428 of 1918, Decided on 22nd July 1919, from appellate decree of Sub-Judge, 1st Court, Shahabad, D/- 17th December 1917.

(a) **Hindu Law — Joint family — Property acquired by wife of member for her own benefit and that of her children — Acquisition is not for benefit of entire joint family.**

Where property is acquired by a lady, whose husband is a member of a joint Hindu family, for her own benefit, and for the benefit of her children, the acquisition cannot be held to be for the benefit of the entire joint family.

[P 540 C 1]

(b) **Benami—Estoppel—Transaction effected to defeat creditor — Creditor defeated—Real owner cannot attack benami transaction—Fraud.**

Where a benami transaction is effected in order to defeat a creditor and the creditor is defeated the real owner cannot subsequently attack the benami transaction.

[P 540 C 1]

Parmeshwar Dayal—for Appellants.

L. N. Singh — for Respondents, was not called upon.

Judgment. — In my opinion this appeal is concluded by the findings of facts. The suit is for possession of certain houses which, it is alleged by the defendants, belonged to the entire joint family of which they are members. The root of title to these houses is a deed of gift executed by the Maharaja of Dumraon in favour of Mt. Phuljharra. The plaintiffs claim through this lady. The case of the defendants is that all these houses were joint family properties. They were purchased by the Maharaja of Dumraon in execution of a mortgage decree obtained by him against the joint family, and subsequently he executed a deed of gift in favour of Mt. Phuljharra but intending to confer the benefit on the entire joint family. In other words the assertion of the defendants is an assertion of benami. The reason for benami is given in para. 8 of the written statement. I shall have something to say as to that presently. But it seems to me that upon the finding of the lower appellate Court it must be held that the plaintiffs are

entitled to succeed in the action. First of all, the deed recites that owing to the application of the grantee, that is to say, Mt. Phuljharla, the gift is made to her land her heirs. As the lower appellate Court points out the document does not recite that it was made for the benefit of the whole family of which the grantee was a member. The lower appellate Court finds that there is no evidence on the record that Rs. 700, which was paid as Nazrana to the Maharaja, was paid out of the joint family funds. The lower appellate Court has found that the houses in suit have been repaired at the cost of the plaintiffs and that there are account papers to prove the fact of such payment towards costs.

The learned vakil on behalf of the appellant argues on the authority of a case reported as *Nabin Chunder Chowdhry v. Dokhobala Dasi* (1) that where property is acquired in the name of a wife whose husband is a member of a joint family, it must be presumed that the acquisition in her name is for the benefit of the entire joint family. That may be so, but here the Court has found as a fact that the property was acquired by Mt. Phuljharla for her own benefit and for the benefit of her children. Therefore, this finding of fact is binding on me. Next, it seems to me that in any case the appellants, or some of them are estopped from putting forward their title to these houses in view of their own written statement as contained in para. 8 thereof. There they give a reason for the benami. They say that there was a decree against the joint family and in order to safeguard the property against the creditors who had a decree against them, it was decided that the property should be put in the name of Mt. Phuljharla. The judgment obtained by the creditors is on the record and it shows that the judgment debtors were one Debi Ram who is not a party in this litigation and Debi Ram who is the father of defendants 1, 2 and 3. The lower appellate Court says, and the judgment which has been put in supports that statement, that Debi Ram and Deni Ram successfully saved this property from sale at the instance of the decree holder. The question arises that having entered into a fraudulent transaction of this nature and having succeeded in the fraud,

are they entitled to plead their own fraud and claim to prove the benami nature of the transaction? The question has been debated in more cases than one. It is unnecessary to deal with them, but the authorities certainly establish that no man can allege his own fraud to invalidate a transaction entered into by him. The case made by the defendants is:

"We entered into this benami transaction in order to save the property from creditors. We have succeeded in saving the property from the creditors and now there is no longer any necessity for the benami character to continue, and therefore we ask the Court to declare the benami nature of the transaction."

In my opinion they cannot be heard to take up a position like that. In my opinion this appeal fails and must be dismissed with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 540

DAS, J.

Jugul Kishore—Petitioner.

v.

Bachinder Mohan and others—Opposite Parties.

Civil Revn. Nos. 108 and 109 of 1919, Decided on 8th July 1919, from orders of Munsif, Purneah.

(a) Civil P. C. (1908), O. 9, R. 9, and O. 21, R. 90—Order dismissing for default application to set aside sale—O. 9, R. 9, does not apply.

Order 9, R. 9, does not apply to an order dismissing for default an application to set aside under O. 21, R. 90, of the Code, a sale held in execution of a decree. [P 541 C 1]

(b) Civil P. C. (1908), O. 9, R. 4, and O. 21, Rr. 100 and 101—Case under O. 21, Rr. 100 and 101 is not case within meaning of O. 9, R. 4.

Rule 4, O. 9, expressly applies to suits, and a case under O. 21, Rr. 100 and 101, is not a suit within the meaning of that rule. [P 541 C 1]

Akbari Husnain—for Petitioner.

Nirsu Narain Singh—for Opposite Parties.

Judgment.—These two revision petitions come before me under the following circumstances: The petitioner purchased and got possession of a jote belonging to the judgment-debtor on 24th March 1918. On the 23rd April the opposite party preferred an objection under O. 21, Rr. 100 and 101. At the time of the hearing of the application the opposite party failed to put in an appearance, with the result that its petition under O. 21, Rr. 100 and 101, was dismissed for default on 15th September 1918. On 21st October 1918 they put

(1) [1885] 10 Cal. 686.

in a petition under O. 9, R. 4, Civil P. C. for rehearing of the petition which was dismissed for default. This petition for rehearing was rejected on 29th November 1918 as no step was taken by the applicant. On 30th November 1918 there was another application under O. 9, R. 4, by the opposite party for restoring to file the execution case which was dismissed for nonprosecution. On 20th January 1919 the petition of 30th November 1918 was allowed and the rehearing of the case was restored to its original number, that is to say, the rehearing case which was rejected on 29th November 1918 was restored to its original number. Against this order of 20th January 1919 there is one petition being Revision Case No. 109 of 1919. Subsequently by a further order, dated 3rd February 1919, the rehearing petition was allowed and the objection case was restored to its original number. As against this order of 3rd February 1919 there is another application which is Revision Case No. 108 of 1919.

The point which has been taken before me by the learned counsel appearing on behalf of the petitioner is very short, and it is this: that the Court had no power under O. 9, R. 4, to restore a case under O. 21, Rr. 100 and 101. The Special Bench of this Court has decided in the case of *Bhubaneswar Prasad Singh v. Tilakdhari Lal* (1) that O. 9, R. 9, Civil P. C., 1908, does not apply to an order dismissing for default an application to set aside under O. 21, R. 90, a sale held in execution of a decree. In my opinion that decision is applicable to the facts of this case. It seems to me that O. 9, R. 4, expressly applies to a suit and it cannot be urged at all that a case under O. 21, Rr. 100 and 101, is a suit within the meaning of O. 9, R. 4.

I hold that I am bound by the decision of the Special Bench of this Court and I would therefore allow these applications and set aside the orders passed by the learned Munsif on 20th January 1919 and 3rd February 1919. The petitioner is entitled to his costs which I assess at two gold mohurs in each case.

V.S./R.K. *Petitions allowed.*

(1) [1919] 4 P.L.J. 135=49 I.C. 617.

A. I. R. 1919 Patna 541

DAS, J.

Kali Charan Roy and others—Defendants—Appellants.

v.

Kesho Prasad Singh—Plaintiff—Respondent.

Second Appeals Nos. 1269 to 1280 of 1917, Decided on 14th April 1919, from decision of Dist. Judge, Shahabad.

(a) **Court-fees Act (1870), S. 7 (2)**—Words “other sums payable periodically” must be limited by specific words that precede it.

In construing a statute the general rule is that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. Consequently, in construing S. 7, Cl. (2), Court-fees Act, the expression “other sums payable periodically” must be limited by the specific words that precede it. [P 542 C 2]

(b) **Court fees Act (1870), S. 7 (4) (c)**—**Suit for assessment of rent and for recovery of specific sums of money as damages for use and occupation—Court-fee is payable under S. 7 (4) (c).**

A suit for assessment of rent and for recovery of a specific sum of money as damages for use and occupation is in the nature of a suit to obtain a declaratory decree where consequential relief is claimed, and the amount of court-fees payable on such a suit should be computed according to Cl. (4) (c), S. 7 Court-fees Act.

[P 542 C 1, 2]

(c) **Interpretation of Statutes—Fiscal enactment.**

A fiscal enactment should, as far as possible, be construed in favour of the subject, and the construction most beneficial to the subject should be adopted. [P 542 C 2]

Parameshwar Dayal—for Appellants.

Krishna Sahai and Nirsu Narayan Sinha—for Respondent.

Judgment.—These analogous appeals come before me from an order of the District Judge of Shahabad rejecting the appellants' appeals to that Court on the ground that proper Court-fees were not paid by the appellants, and the only question which I have to determine is, did the appellants pay proper court-fees on their appeals to that Court?

The appellants were the defendants in the actions which were for assessment of rent and for recovery of specific sums of money as damages for use and occupation of the land. The learned Munsif who heard the suits held that Rs. 10-2-0, besides cess, per bigha, would be a fair and equitable rent for the holdings in suit. In the result the learned Munsif made a declaration to that effect and gave the plaintiff a decree for damages calculated at Rs. 10-2-0 per bigha for six years from 1317 to 1322. The tenants-defen-

dants preferred appeals to the Court of the District Judge at Shahabad. They paid court-fees on the amount decreed against them under S. 7, Cl. (4) (c), Court-fees Act. The learned District Judge, however was of opinion that S. 7, Cl. (2), Court-fees Act, applied and called upon the appellants to pay the proper court-fees on the principle enunciated in that clause. The appellants took time to pay, but ultimately they were unable to comply with the order. The District Judge thereupon rejected their appeals. It seems to me that the plaintiff's suits were suits "to obtain declaratory decrees or orders where consequential reliefs are prayed" and that prima facie S. 7, Cl. (4) (c), would apply, but it is argued that the suits were suits for a sum payable periodically, and that therefore S. 7, Cl. (2), would apply. S. 7, Cl. (2), runs as follows:

"In suits for maintenance and annuities or other sums payable periodically, according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year."

It is urged on behalf of the appellants that the suits were substantially suits for assessment of rent which would be payable periodically and that therefore the learned District Judge was right in asking the appellants to pay according to the principle laid down in S. 7, Cl. (2). The critical question for my determination therefore is what effect must be given to the words "or other sums payable periodically" which immediately follow the words "In suits for maintenance and annuities." It will be noticed that I have to construe certain general words which follow particular and specific words. Clearly the suits were suits neither for maintenance nor for annuities. Were they suits for other sums payable periodically?

"I accede to the principle," said Lord Campbell in *R. v. Edmundson* (1), "laid down in all the cases which have been cited that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

In *Ashbury Railway Carriage and Iron Company v. Riche* (2) a question arose as to the meaning of the words "general contractors."

"Upon all ordinary principles of construction," said Lord Cairns, "these words must be referred to the part of the sentence which immediately precedes them therefore the

term 'general contractors' would be referred to that which goes immediately before, and would indicate the making generally of contracts connected with the business of mechanical engineers."

In the same case Lord Chelmsford said:

"It seems to me that the generality of the expression is limited by its association with the previous words 'mechanical engineers' and it ought to be confined to contracts connected with that business."

It seems to me that we must apply this rule of ejusdem generis for the purpose of construing S. 7, Cl. (2), Court-fees Act, for it is difficult to conceive why the legislature should have taken the trouble to specify in this section certain classes of suits, which undoubtedly are suits for sums payable periodically, except to limit the generality of the expression that follows and to indicate that the general words must be confined to things of the same kind as those specified. In my opinion the generality of the expression "other sums payable periodically" must be limited by the specific words that precede; and when so limited, S. 7, Cl. (2), would read as follows:

"In suits for maintenance and annuities or other sums of the same kind payable periodically."

Now, can it be said that a sum of money payable as rent is of the same kind as a sum of money payable as maintenance or annuity? I think not and therefore I must hold that the court-fees paid by the appellants under S. 7, Cl. (4) (e), of the Act were sufficient. In this connexion it is necessary to remember that a series of cases of the highest authority have repeatedly laid down that fiscal enactments should as far as possible, be construed in favour of the subject, and that in cases of a doubt, the construction most beneficial to the subject is to be adopted. I allow these appeals and remand the cases to the lower appellate Court to be disposed of according to law. The respondent must pay the costs of these appeals. The costs incurred in the Courts below will abide the result and will be disposed of by the lower appellate Court. The appellant is entitled to a certificate authorizing him to receive back from the Collector the full amount of fee paid on the memorandum of appeal to this Court.

V.S./R.K.

Appeals allowed.

(1) [1859] 28 L. J. M. C. 213.

(2) [1875] 7 H.L. 653.

A. I. R. 1919 Patna 543

ATKINSON AND MANUK, JJ.

Mt. Dukhno—Petitioner.

v.

Munshi Sahu—Opposite Party.

Civil Revn. No. 243 of 1918, Decided on 11th February 1919, against orders of Munsif, Monghyr, D/- 25th July 1918.

(a) Civil P. C. (1908), S. 148—Discretion under S. 148 for enlarging time ought not to be arbitrarily exercised in matters in which rules of limitation apply but only after proper judicial consideration—Limitation Act (1908), Ss. 5 and 18.

The discretion granted by S. 148 of enlarging the time for doing an act ought not to be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under S. 5, or the fraud established under S. 18, Lim. Act [P 544 C 1]

(b) Civil P. C. (1908), S. 115—Court not applying its mind to question of limitation and arbitrarily granting application for restoration of suit acts without jurisdiction.

Where a Court fails to apply its mind to the question of limitation and arbitrarily grants an application for the restoration of a suit long after the period of limitation has expired, it acts without jurisdiction and its order is liable to be set aside by the High Court acting under S. 115.

[P 544 C 2; P 545 C 1]

(c) Civil P. C. (1908), S. 148—Litigant guilty of laches cannot claim indulgence under S. 148.

Litigants who are guilty of gross laches and who refuse to comply with the orders of a Court ought to be shown no indulgence under S. 148.

[P 545 C 1]

Jagarnath Prasad—for Petitioner.*Atul Krishna Ray*—for Opposite Party.

Manuk, J.—The facts upon which this application is made to us in our revisional jurisdiction are as follows: The respondent before us instituted a suit on 17th May 1917 against numerous defendants; the suit was dismissed under O. 9, R. 8, Civil P. C., on 24th April 1918. On 8th May 1918 the plaintiff (now respondent) applied under O. 9, R. 9, to set aside the dismissal and restore the suit. On this application the learned Munsif before whom it was filed recorded the following order:

"Class of suit, copy of judgment, vakalatnama written process and talbana are not filed. Returned to be re-filed after removal of defects by 20th May 1918."

On 17th May, for some reason not apparent, we find another order by the Munsif to the effect that the previous order had not been complied with, and the application was again returned to be re-filed by 8th June after removal of the

defects. The next order is on 11th June 1918, and this is to the effect that, as the previous orders are still uncomplied with, the application is once more returned to be refiled by 15th June 1918. On 15th June it transpired that the application related to a suit valued above Rs. 1,000, and it was accordingly "returned for presentation before the proper Court." The matter next came up on 22nd June, when the order (this time passed apparently by a Subordinate Judge) runs:

"Nature of the suit and date of disposal of the same are not given. Returned for compliance, and re-file within a week."

It was then re-filed after amendment on 29th June, when the record was sent for, and it was ordered that the application should be put up with the record on 16th July. On 18th July however a note was submitted to the learned Subordinate Judge by his office asking for directions as to whether the application should be registered in his Court or be sent to the first Munsif, who was "vested with power to try suits of special jurisdiction." On 9th July the learned Subordinate Judge directed that the application should be returned to be filed before the first Munsif, who is vested with special jurisdiction. The matter next came up on 18th July, presumably before the first Munsif. On that date the office submitted a note to the learned Munsif, pointing out that the application was originally filed as under O. 9, R. 13, and hence a copy of the judgment was demanded together with process fee and a vakalatnama, and it was not clear why the application was made under O. 9, R. 13, and not under O. 9, R. 9. The serious laches of the petitioner in repeatedly failing to comply with the orders of the Court and the present defects were also set out. Amongst other defects still present were (i) the process fee filed was still inadequate, and (ii) the orders of 9th May had not yet been complied with. It was also pointed out by the office that no cause had been shown for the delay in filing the petition within the time limit of 30 days from the dismissal as required by statute. In the face of this report all that the learned Munsif did was to record a peremptory order in a single word, "admit." This was a week later on 25th July, and without any notice to the defendants. On

that date an order was also entered in the order-sheet in the following terms :

" Application under O. 9, Civil P. C., admitted. Register. Petitioner to file deficit talbana Re. 1 by 3rd August 1918. "

Finally, on 24th August 1918 the pleaders on behalf of the parties were heard, and the learned Munsif, without applying his mind in the least to the serious question before him as to whether the application was filed within time or not, proceeded to pass a formal order restoring the case on the applicant paying Rs. 5 to the respondent. It is noticeable that not a single argument adduced on behalf of the present petitioner before us finds a place in the learned Munsif's order; the Munsif seems to have endeavoured to justify his previous ill-advised order " admit " by accepting various extenuating circumstances urged on behalf of the present respondents for their original default. Now under these circumstances we are asked by Mr. Jagarnath Prasad, on behalf of some of the defendants to the suit, to hold that the learned Munsif has acted without jurisdiction, inasmuch as on 25th July, when he admitted the application and on 24th August, when he set aside the dismissal, the application was long since barred by time. On the other hand Mr. Roy, the learned vakil for the plaintiff, has strenuously argued that the application having been filed within time on 9th May, it was open to the Court under S. 148, Civil P. C., to extend the period from time to time within its discretion and that having done so, there was no reason why on 25th July the Court should not have admitted the application.

I am of opinion that the discretion granted by S. 148 cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under S. 5 or the fraud established under S. 18, Lim. Act. Now in the case before us we hold that the application filed on 9th May was no application at all within the provisions of O. 9, R. 9. The nature of the suit, the date of disposal of the same, the correct provisions of the Code under which the application was made, and various other matters necessary for the Court to consider the application at all and

entertain it were lacking ; these defects were pointed out by the Munsif and his office to the petitioners, but no attempt was made to remedy these defects within time ; and therefore all arbitrary extensions of time to re-file the application after the 30 days had elapsed were beyond the jurisdiction of the Munsif to grant.

Mr. Roy has also referred us to the decision in *Jhotu Lal Ghose v. Ganouri Sahu* (1), and he contends that the Munsif, having rightly or wrongly admitted the application and restored the suit, has acted within his jurisdiction, and that therefore we should not interfere under S. 115, Civil P. C. Now the case of *Jhotu Lal Ghose v. Ganouri Sahu* (1) is distinguishable from the case before us in one very important respect. In that case the Munsif had considered the question of limitation, had applied his mind to the objection that the application was barred by limitation and had decided in fact that it was not so barred. It was argued on behalf of the petitioner there that Munsif had fallen into an error in holding that the application was not barred by limitation. Under those circumstances the learned Judges held that even if it were conceded that the Munsif had fallen into an error either of law or of fact that was not an error in the exercise of jurisdiction which could be interfered with by this Court under S. 115, Civil P. C. Now in the case before us there is not a single indication throughout the numerous orders that any of the Courts dealing with the petition applied its mind in any manner whatsoever to the question of limitation ; nor indeed can we see how the learned Munsif who eventually admitted the application on 25th July 1918, could have done so, having regard to the fact that it was brought prominently to his notice that no reason for the neglect to file the petition within time had been stated in any of the numerous petitions to the Court, or upon any of the numerous occasions on which the Court was approached. There having been therefore no application of the learned Munsif's mind to the question of limitation at all, and he having arbitrarily admitted the petition and restored the suit long after the period of limitation had expired, the impeached orders were, in our opinion, made with-

(1) [1918] 46 I. C. 176=3 P. L. J. 376.

out any jurisdiction whatsoever. It would we think, be disastrous to give effect to Mr. Roy's contention that a Court may keep alive a cause of action for an indefinite period of time by granting, without cause shown and without consideration, indulgence after indulgence under S.148, Civil P. C., to litigants who are guilty of the grossest laches, and who refuse to comply with the orders of the Court. The Privy Council have more than once animadverted on the law's delays in this country; and to allow the subordinate Court to proceed as the learned Munsif has in this particular case without correction or interference by this Court under S. 115, Civil P. C., would simply be to encourage the evil which their Lordships of the Privy Council have so often condemned.

For all these reasons we set aside the orders of the Munsif, dated 25th July 1918, and 24th August 1918, with costs.

Atkinson, J.—I just desire to say that in my opinion there was no application before the Court to restore the suit that was originally dismissed under O. 9, R. 9, on 25th July 1918 and that on that date limitation had expired, and the application presented was barred, and, in my opinion, the Court of the first Munsif of Monghyr had no jurisdiction to entertain the application which was then statute-barred. Any other application of the law would render the law of limitation nugatory and senseless, and I am not aware of any authority that can be cited in support of the argument that has been addressed to us.

V.S./R.K.

Order set aside.

A I. R. 1919 Patna 545

ATKINSON AND JWALA PRASAD, JJ.

Guru Prasad Sahu—Petitioner

v.

Ajodhya Nath Parhi and others—Opposite Parties.

Criminal Revn. No. 14 of 1919, Decided on 29th May 1919, against order of District Magistrate, Balasore, D/- 25th March 1919.

Criminal P. C. (1898), Ss. 200 and 345—Failure to examine complainant is improper—Noncompoundable offence—Compromise cannot be sanctioned.

A complaint was made to a Magistrate against several persons of the offence of theft. The Magistrate, without examining the complainant upon oath, held a local investigation and found that an offence in the nature of theft had been

committed. During the course of the investigation the parties agreed to a compromise which was sanctioned by the Magistrate. The accused failing to abide by the terms of the compromise the complainant applied to have the order sanctioning the compromise set aside and for permission to proceed with his original petition of complaint:

Held: that the proceedings of the Magistrate were altogether irregular and improper, inasmuch as the offence complained of was not compoundable, and he therefore had no jurisdiction to entertain or sanction the compromise entered into between the parties, or even to permit the same to be filed. [P 546 C 1]

S. A. A. Asghar and Gajendra Prasad Das—for Petitioner.

Gour Chandra Pal—for Opposite Parties.

Judgment.—The only question arising for determination in this application for revision is whether the order confirming the compromise arrived at between the parties dated 11th February 1919 is valid or invalid; and if invalid, whether the same should be set aside. The petition of complaint filed by the complainant avers facts which tend to show that a theft from the Kutcheri house in village Jamhari had been committed by the opposite party of certain articles and property belonging to the complainant therein; and that the ingredients necessary to constitute an offence under S. 380, I. P. C. existed. The Magistrate failed and omitted to take the necessary steps to examine the complainant as he should have done immediately on the filing of his petition of complaint, having regard to the frame of his petition relative to the matters stated therein. The learned Magistrate, instead of proceeding to examine the complainant as he ought to have done, proceeded to hold a local investigation; and when he went to the scene of occurrence, he found a condition of things existing which showed that the case put forward by the complainant was not entirely false, and he assigned reasons which we think cogent to show that a crime in the nature of a theft had been committed.

During the course of this investigation the opposite party came forward and suggested that a compromise might be effected on a certain basis. The parties on both sides agreed that a compromise should be arrived at between them, as it was more or less a matter of family dispute. But the opposite party represented before us by Mr. Gour Chandra

Pal failed to carry out the terms of the compromise. Hence the petitioner seeks now to have the order of 11th February set aside, and craves permission to proceed with his petition of complaint unfettered by the terms of the order of 11th February 1919. The offence charged in the petition of the complainant would appear to constitute an offence under S. 380, I. P. C., and consequently be a noncompoundable criminal charge, and therefore the learned Magistrate ought not to have sanctioned or entertained the compromise entered into between the parties or permitted the same to be filed. As far as I can see, every step taken by the learned Magistrate in the course of the proceedings has been irregular from their inception to their end. We are quite satisfied that in point of law the order of 11th February was quite irregular and improper and must be set aside, and we order that the complainant shall be entitled to proceed on his petition of complaint in due course of law as if the order of 11th February 1919 had never been made. We have no evidence before us as to the merits of the petitioner's claim; and we refrain in an application of this character from expressing any opinion as to the merits or demerits of the case of either of the parties to the contemplated pending criminal proceedings. Accordingly we allow this application.

V.S./R.K. *Application allowed.*

A. I. R. 1919 Patna 546

MULLICK AND JWALA PRASAD, JJ.
Munshi Lal Choudhry—Petitioner.

v.

Nidhi Ram Dutta—Opposite Party.

Civil Revn. No. 232 of 1918, Decided on 25th February 1919, from a decision of Deputy Commissioner, Purulia, dated 5th July 1918.

Chota Nagpur Tenancy Act (1908) Ss. 217, 227 and 228—Rent suit decreed ex parte—Application to set aside dismissed in default—Application for restoration of application dismissed—On appeal ex parte decree set aside and case remanded—Application for restoration of application to set aside ex parte decree held not tenable under Act and no appeal lay to Deputy Commissioner against dismissal of such application—Setting aside ex parte decree was without jurisdiction—No revision lay to revenue authorities—High Court held competent to revise such order being without jurisdiction.

A rent suit was tried by a Deputy Collector exercising the powers of a Deputy Commissioner

under the Chota Nagpur Tenancy Act and was decreed ex parte. The defendant's application to set aside the ex parte decree was dismissed in default, and a further application for restoration of the previous application was also dismissed. He then filed an appeal to the Deputy Commissioner who set aside the ex parte decree and remanded the suit for re-trial. [P 548 C 2]

Held, (1) that there was no provision in the Chota Nagpur Tenancy Act for restoration of an application to set aside an ex parte decree which had been dismissed for default, and that therefore the second application made by the defendant to the Deputy Collector was incompetent; (2) that no appeal lay to the Deputy Commissioner against the order dismissing that application; (3) that the Deputy Commissioner's order setting aside the ex parte decree was therefore without jurisdiction; (4) that the Deputy Commissioner having acted without jurisdiction, his order could not be revised by the Revenue Authorities under S. 217, Chota Nagpur Tenancy Act; (5) that therefore the High Court had jurisdiction to revise the order which being without jurisdiction must be set aside. [P 549 C 1]

Abani Bhusan Mukherjee—for Petitioner.

G. C. Pal—for Opposite Party.

Mullick, J.—The facts of the case out of which this application for revision arises are these: In Rent Suit No. 1770 of 1908 the plaintiff obtained an ex parte decree against the defendant for Rs. 169 on 19th February 1908. The suit was tried by a Deputy Collector, exercising the powers of a Deputy Commissioner within the meaning of the Chota Nagpur Tenancy Act. On 4th March 1918 the defendant filed an application to set aside the ex parte decree. That application was dismissed for default on the 21st March. The defendant made a further application for a restoration of his petition on 4th March 1918. That application was dismissed on 23rd April 1918. The defendant then filed an appeal to the Deputy Commissioner who on 5th July 1918, set aside the ex parte decree and remanded the rent suit for re-trial. It is against this order of the Deputy Commissioner that the present application under S. 115, Civil P. C., is made to us.

It is contended that the Deputy Commissioner had no jurisdiction to direct the re-trial of the original suit. It appears that S. 227, Chota Nagpur Tenancy Act, allows a defendant to set aside an ex parte decree by making an application to the trial Court. It is clear that the application under this section is to be made to the Deputy Commissioner, if he has tried the suit himself or to the officer

who has exercised his powers in that respect in his behalf. It is not to be made to the Deputy Commissioner if he was not the trial Court.

If the Deputy Collector refuses to restore the case then there is an appeal under S. 228 to the Deputy Commissioner. The Act does not make any provision for the restoration of an application under S. 227 which has been rejected by the trial Court unless perhaps by way of review of judgment. It is contended therefore on behalf of the petitioner that the application for restoration which was dismissed on 23rd April 1918 was not entertainable by the Deputy Collector, and that no appeal against that order of dismissal lay under S. 228 to the Deputy Commissioner. The learned vakil for the opposite party replies to this as follows: He says that under S. 265 of the Act the provisions of the Civil Procedure Code apply and confer upon the defendant the right to make an application for review of the judgment of the 21st March 1918 and that the order of 23rd April 1918 granting the review was an order appealable under S. 215 of the Act, to the Deputy Commissioner. The contention therefore is that apart from S. 228, there was an appeal to the Deputy Commissioner under S. 215. The first reply to this is that if the Deputy Commissioner was entertaining an appeal against the order of the 23rd April 1918 then he had no right to set aside the order 19th February 1918. The second reply is that S. 215 only gives a right of appeal in respect of orders (as distinguished from judgment in suits and certain other orders) passed under the provisions of the sections which precede S. 215. An order made under S. 265, therefore is not appealable under S. 215. The third reply is that S. 265 confers a right of review against a judgment. The order of 21st March 1918 dismissing the restoration application for default was not a judgment and therefore there was no right of review against it. Therefore the last application to the Deputy Collector which was dismissed on 23rd April 1918 was not entertainable and therefore an appeal also is not competent whether under S. 215 or any other section.

The learned vakil for the opposite party finally contends that as S. 217

gives the Commissioner and the Board of Revenue revisional powers in respect of orders made under S. 215 by the Deputy Commissioner, we should not interfere. That would be a perfectly valid contention if there was such a remedy obtainable from the revenue authorities. But S. 217 only gives the revenue authorities power to interfere in respect of orders by the Deputy Commissioner under S. 215 if he has jurisdiction. Where the Deputy Commissioner makes an order without jurisdiction, the revenue authorities clearly cannot interfere under S. 217. The application therefore will be allowed and the order of the Deputy Commissioner dated 5th July 1918 be set aside with costs, hearing-fee two gold mohurs.

Jwala Prasad, J.—I agree.

V.S./R.K.

Application allowed.

A. I. R. 1919 Patna 547

DAS, J.

Kalwa Gope—Petitioner.

v.

Antonini—Opposite Party.

Civil Criminal Revn. No. 12 of 1919, Decided on 30th May 1919, against the order of Subdivisional Magistrate, Bhagalpore.

Criminal P. C. (1898), S. 195—Inquiry must be complete in every detail—Considerable ill-feeling between parties and likelihood of misuse of law—Sanction ought not to be granted—Court has to use its discretion with caution.

Although no hard and fast rule can be laid down as to the manner in which an inquiry should be made under S. 195 it is necessary that the inquiry should be complete in every detail.

[P548 C2]

An inquiry confined to an examination of the accused and his witnesses is not sufficient. The inquiry should proceed on the allegations made by the party who asks for sanction and on the basis of materials placed by him before the Court, and the Court should abstain from pronouncing any opinion on the merits of the case. The Court has a wide discretion in the matter of granting or withholding sanction, but that discretion should be used with caution and discernment to further the ends of justice and not to permit the use of the penal law to satisfy private ends or personal spite. Where it appears that there is considerable ill-feeling between the parties, and there are grounds for believing that there is a likelihood of a misuse of the law, sanction ought not to be granted.

[P 549 C 1]

A. A. Asghar and Khurshed Husnain—for Petitioner.

Fakhruddin—for the Crown.

Judgment.—This application is directed against an order passed by the Subdivisional Magistrate of Bhagalpore gran-

ting sanction to Mr. Antonini to prosecute the petitioner under S 211, I. P. C. It appears that there was considerable ill-feeling between the parties. The occurrence in respect of which the petitioner lodged a complaint against Mr. Antonini is alleged to have taken place on 27th October 1918. On 26th October 1918 however the petitioner's brother lodged a complaint against Mr. Antonini charging Mr. Antonini with having assaulted him. On 28th October, that is to say, two days after the last mentioned incident, Mr. Antonini himself filed a complaint against Sadho Gope and others, including the petitioner, charging them with having assaulted him and wrongfully confining him. It appears from the affidavit filed before this Court on behalf of the petitioner which has not been denied on oath by Mr. Antonini, that the complaint of Sadho Gope, which, it must be remembered, was filed on 26th October 1918, was ordered to be put up after the disposal of the case instituted by Mr. Antonini against Sadho Gope and others. In respect of the complaint filed by Mr. Antonini Sadho Gope and others have been convicted.

The case of the petitioner in respect of the incident of 27th October 1918 was that Mr. Antonini came with a gun, abused him and fired the gun which he had with him and killed a goat belonging to him. That was the complaint which he filed on 28th October 1918. On this point he was examined on oath and the Magistrate ordered a police inquiry into the allegations made by the complainant. The police reported the case to be false. The petitioner was not satisfied with the enquiry held by the police and asked for the judicial inquiry. This was refused by the Magistrate, who thereupon dismissed the complaint under S. 203, Criminal P. C.

On 6th November 1918 Mr. Antonini presented a petition asking for sanction under S. 195 to prosecute the petitioner under S. 211, I. P. C. Upon this the learned Subdivisional Officer called on the petitioner to show cause why he should not be prosecuted under S. 211, I. P. C., for bringing a false case against Mr. Antonini. He was further ordered to adduce evidence on that date in support of his own case. It is unnecessary to go through all the orders recorded by the learned Subdivisional Officer, but

it is necessary to mention that he never examined Mr. Antonini or any witness on his behalf but proceeded to examine the opposite party on oath and the witnesses produced by the opposite party. Having done that, he proceeded to record his finding, namely :

"for the reasons already given, I hold that the complainant instituted the present case against the accused, Mr. J. Antonini, with intent to cause injury to him, knowing that there was no just or lawful ground for such proceeding and that the charge was a false one."

In other words, he has decided the whole case against the petitioner. The subsequent trial is intended to be a mere formality for passing sentence on the petitioner. In my opinion the procedure adopted by the learned Subdivisional Magistrate cannot be supported on any principle at all. It is a procedure which is condemned by the learned and distinguished Judges who decided the case of *In re An Attorney* (1). Had the learned Subdivisional Magistrate carefully perused that decision, he would have seen that an inquiry complete in every detail was made by the High Court into the complaint made before that Court, but it was not an inquiry by the examination of the person against whom sanction was sought and his witnesses. It is impossible to lay down any hard and fast rule as to the manner in which the inquiry should be held by the sanctioning Court, but it is clear that the inquiry must proceed on the allegations made by the party who asks for sanction and on the basis of the materials placed by him before that Court. It is greatly to be regretted that the learned Subdivisional Officer should have recorded a finding which obviously must operate to the prejudice of the petitioner. The learned Government Pleader argues that this order will not be binding on the Magistrate who ultimately tries the case. That may be so in a technical sense, but at the same time it is impossible for any Court to avoid looking into the order itself which gives it power to try the case. It is exactly for this reason that the learned Judges in *In re An Attorney* (1) point out that it is in the highest degree inexpedient to pronounce an opinion on the merits of the case. The late Chief Justice of the Calcutta High Court says :

"I purposely refrain from discussing the merits of the present case; it would be wrong that I should."

Chaudhuri, J., in the same case points out:

"If it was held to be the law that the sanctioning Court must be satisfied of the guilt of the accused, his trial might degenerate into a mere formality. It might obviously operate to his prejudice."

It is in my opinion idle for the Government Pleader to argue that the opinion of the sanctioning Court would have no effect at all in the subsequent trial of the person against whom sanction is sought. I have already stated that there is considerable ill-feeling between the parties. It must be remembered that a bar has been deliberately imposed by the legislature on prosecution for certain offences enumerated in S. 195, Criminal P. C. The sanctioning Court undoubtedly has a wide discretion in the matter, but it is a discretion which must always be used with caution and discernment, having regard to the well-known principle that a weapon should not be placed in the hands of a private party who may hold it in *terrorem* over the party against whom sanction is sought. One of the rules of prudence which has been recognized from the earliest times is that :

"the Court will be astute to see that there shall be no abuse of the administration of criminal justice. No one therefore would be permitted to use the penal law merely to satisfy his private ends or personal spite; that would be to misuse it."

I do not hold in this case that the sanction if granted would be used by the opposite party to satisfy his private spite, but I do hold that there are grounds for believing that he might do so. If he might do so, then in my opinion it is obviously not a case where sanction should be granted under S. 195, Civil P.C. I would therefore set aside the order passed by the Subdivisional Magistrate and direct that no further proceedings be taken.

V.S./R.K.

Order set aside.

A. I. R. 1919 Patna 549

DAS, J.

Sat Narayan Singh and others—Plaintiffs.—Appellants.

v.

Anant Prosad and others—Defendants—Respondents.

Second Appeals Nos. 1086 to 1090, of 1917, Decided on 14th April 1919, from decision of Sub. Judge., Monghyr, D/- 12th September 1917.

Cosharer—Tenant inducted into land by one cosharer—Other cosharer cannot sue for compensation for use and occupation.

A cosharer landlord is not entitled to recover compensation for use and occupation from a tenant inducted into the land by another cosharer landlord. [P 550 C 1]

Siva Narain Bose—for Appellants.

Abani Bhusan Mukerjee, Siva Nandan Roy and Mohmed Hasan Jan—for Respondents.

Judgment.—The point which I have to determine in this appeal is whether a cosharer landlord is entitled to recover compensation for use and occupation from a tenant inducted into the land by another cosharer landlord. The appellant is the two annas proprietor of a certain mahal, of which the Indigo Concern at Manjhowl is also a proprietor to the extent of 3 pies share therein. The lower appellate Court says that the Factory let out the lands to the defendants at a time when the plaintiff had acquired no right. This is wrong, as the sale certificate produced by the plaintiff shows. We may take it therefore that the Factory settled the land with the defendants without the consent of the plaintiff although the Factory had only 3 pies share in the mahal. The problem that I have to consider is, what is the plaintiff's remedy.

Now the plaintiff's suit is not a suit against his co-owner, the Factory, for compensation for the exclusive use of the joint land according to the plaintiff's share in such land. It is not a suit for ejectment of the defendants or for joint possession with the defendants on the ground that so far as the plaintiff's share is concerned, the Factory was not entitled to induct tenants against the will of the plaintiff. As I read the plaint, the suit is a suit against the tenants for compensation for the use and occupation of his share of the land.

In England it is well established that it is not trespass for one co-owner to use the common property in the natural and necessary course of use or enjoyment: see *Job v. Potton* (1). In the case of *Jacobs v. Swards* (2) the point was investigated with great care and precision by Lord Hatherly who, in the course of his speech, said:

"The cases in which trover would lie against a tenant-in-common are reducible to this. They are cases in which something has been done which has destroyed the common property, or

(1) [1875] 20 Eq. 84.

(2) [1872] 5. H. L. 464.

where there has been a direct and positive exclusion of the co-tenant in common from the common property, he seeking to exercise his rights therein, and being denied the exercise of such rights As long as the tenant-in-common is confining the use of that property to its legitimate purpose trover will not lie against him. But the moment he steps from the legitimate use to that which is illegitimate . . . trover will lie."

This principle of English law is founded on the doctrine that the act of one tenant-in-common is considered in law as the act of all the tenants-in-common, and this because the occupation (as is said in Co. Litt. 189a) is undivided. So strict was the rule at common law that before the Statute of Anne, the other tenants-in-common could not charge the tenant-in-common who had received the profits as bailiff, though in equity a co-owner who had received the profits was always bound to account at the suit of the others: see *Strelly v. Winson* (3).

We may therefore take it as settled law in England that, if the land is agricultural land, one co-owner would be entitled to enter upon the land and to use the common property in the natural and necessary course of use or occupation without subjecting himself to an action in trespass by the other co-owners, the only restrictions upon him being that he may not appropriate to himself more than his share. But would he be entitled to induct tenants upon the land who would, no doubt, use the common property for agricultural purpose? The case of *Wilkinson v. Haygrath* (4), which no doubt was decided on a question of special pleading, certainly suggests that he would be so entitled. Coleridge, J., said in that case: "It must be admitted on the part of the plaintiff that the tenant" (meaning thereby a tenant-in-common) "might license the doing of whatever he might do himself." The point was expressly decided in the case of *Job v. Potton* (1), and I think it was decided by implication in the case of *Jacobs v. Swards* (2). I cannot see on what ground it may be said that though a co-owner may himself enter the land and use it in the natural and necessary course of use or occupation, he cannot induct a tenant on the land for the purpose of using the land in the natural and necessary course of use or occupation. The test in either case is, to what use has the common property been put? If it is used in good husbandry for the proper cultivation

of the land, not in denial of the title of the other co-tenants but with the object of making a profit out of the land, the other co-owners would appear to have no right to maintain an action in trespass either against the co-owners or against a third party who by leave and license of the co-owner is carrying on agricultural operation on the land.

The question as to the right of the co-owners as between themselves was debated in the leading case of *Watson & Co. v. Ramchand Dutt* (5). The Judicial Committee in that case for the first time laid down the law as follows:

"It seems to their Lordships that if there be two or more tenants in common, and one A be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property and another tenant in common, B, attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession."

In the result their Lordships granted B a decree for compensation for the exclusive use of the joint land by A according to B's share in the joint land. The principle of the decision was again affirmed by the Judicial Committee in the case of *Lachmeswar Singh v. Manowar Hossein* (6). From the principle enunciated in these cases to the principle that when one cosharer landlord in possession of common land leases it out to a tenant who improves it without any objection on the part of the other co-sharer landlords, it is not open to the latter to obtain khas possession of the land so improved jointly with the tenant, was but a step and that step was taken in the case of *Madan Mohan Shahu v. Rajib Ali* (7). But it was held in the case of *Radha Prosad Wasti v. Esuf* (8) that:

"no man has a right to intrude upon ijmal property against the will of the cosharers or of any of them. If he does so, he may be ejected without notice, either altogether, if all the cosharers join in the suit, or partially, if only some of the cosharers wish to eject him, and the legal means by which such a partial ejection is effected, is by giving the plaintiffs pos-

(5) [1891] 18 Cal. 10=17 I. A. 110 (P. O.).

(6) [1892] 19 Cal. 253=19 I. A. 48.

(7) [1901] 28 Cal. 223.

(8) [1881] 7 Cal. 414.

(3) 1 Vern. 297=23 E. R. 480.

(4) [1847] 12 Q. B. 837.

session of their shares jointly with the intruder."

At first sight it would seem as if this case is in conflict with the principle which I have deduced from the English cases and upon which, in my opinion, the cases of *Watson & Co. v. Ramchand Dutt* (5) was decided. But there is in fact no conflict when the cases are closely examined. A co-owner of agricultural land has the right to enter the land or authorize somebody else to enter the land, not in denial of the rights of other co-owners, but in exercise of his own right to cultivate the land. He is entitled to protect himself in the profitable use of the land but, apart from that, he is not entitled to exclude the other co-owners from entering the land for the purpose of cultivation. The other co-owners or their tenants are entitled to a decree for joint possession, unless such joint possession interferes with the profitable use of the land by the co-owners first in the field or unless the co-owner of his tenant has improved the land without any objection on the part of the other co-owners. The principles which I deduce from the cases are the following:

(a) It is not trespass for one co-owner A either by himself or by his tenants to use the common property in the natural and necessary course of use or enjoyment. The remedy of the other co-owner B is to sue A, but not his tenants, for compensation according to his share, for the exclusive use of the common property by A. (b) A is entitled to protect himself in the profitable use of the land as to which he is accountable to B, but he is not entitled to exclude B or his tenants from entering the land and carrying on agricultural operations in a way consistent with the continuance of the joint ownership and possession. (c) As a necessary corollary, B or his tenants is or are entitled to maintain a suit for joint possession either with A or his tenants, unless such joint possession interferes with the profitable use of the land by A or unless A or his tenants has or have improved the land to the knowledge of and without any objection by B.

In the case before me the plaintiff does not ask for a decree for joint possession, nor does he seek to recover compensation according to his share from the factory for the exclusive use of the land

by the Factory. In my opinion these were the only remedies open to the plaintiff, unless indeed he chose to recognize the defendant as his tenant, in which case he could maintain an action for rent against the defendant. In my opinion, an action for compensation does not lie against the defendant. An action for compensation is an action in tort and in every action in tort the plaintiff must allege a right in himself which, according to him, has been infringed and a corresponding duty on the defendant, which duty has been broken. There is, in my opinion, no duty cast on the defendant to pay compensation to the plaintiff, but there is undoubtedly a duty cast on the factory to account to the plaintiff for the profits made by it by settling tenants on the land. It seems to me therefore that the plaintiff entirely misconceived his remedy. In my opinion this appeal fails and must be dismissed with costs.

This judgment will govern all the analogous appeals and also Second Appeal No. 1069 of 1917 and the appeal analogous thereto.

V.S./R.K.

Appeals dismissed.

A. I. R. 1919 Patna 551

ATKINSON, J.

Bachu Behari Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 15 of 1919. Decided on 23rd June 1919, against order of Sess. Judge, Saran, D/- 7th May 1919.

Criminal P. C. (1898), Ss. 195 and 476—Order directing prosecution for forgery can be passed against person not party to proceedings—Order for prosecution under S. 466, Penal Code, can be passed under Criminal P. C. S. 195 — "Judicial proceeding" explained.

A plaintiff in a civil case sought to enforce a right by means of a forged deed. The Court sanctioned his prosecution for an offence under S. 209, I. P. C. He was tried and acquitted. An appeal was then made to the Sessions Judge who purporting to act under S. 476, Criminal P. C., sanctioned the prosecution of the petitioner in this case for an offence under S. 466, I. P. C. An application to revise this order was made to the High Court, and it was contended that, inasmuch as the petitioner was not a party to the civil suit out of which the original prosecution arose, the order was bad in law as made without jurisdiction.

Held: that the Sessions Judge was entitled, under S. 476, Criminal P. C., to direct the prosecution of the petitioner for forgery, irrespective of the fact that he was not a party to the original proceedings.

[P 553 C 2]

It was further contended that the Sessions Judge had no power to order the prosecution for an offence under S. 463, I. P. C., because that section is not specifically mentioned in S. 195, Criminal P. C.

Held: that, inasmuch as S. 195, Criminal P. C., confers jurisdiction to grant sanction to prosecute under S. 463, I. P. C., and as the latter section, in its comprehensive and general terms, covers an act of a particular kind of forgery which may constitute a separate offence under the specific enumeration of crimes provided for by the Penal Code, the Sessions Judge had power to make the order. [P 553 C 2; P 554 C 1]

Lastly, it was contended that the Sessions Judge had no right to exercise the powers vested in him by S. 476, Criminal P. C., inasmuch as the matter out of which the prosecution arose did not come before him in the course of a judicial proceeding.

Held: that as there was an appeal to the Sessions Judge from the order discharging the original accused under S. 209, I. P. C. lawfully presented to a proper Court and that Court was of opinion that the petitioner should be prosecuted, the Sessions Judge did have before him a judicial proceeding in the course of which he became acquainted with the facts as to the petitioner's participation in the act of forgery, and that he did not exceed his powers in making the order in question. [P 554 C 1]

S. P. Varma—for Petitioner.

The Govt. Advocate—for the Crown.

Judgment.—The petitioner in this application seeks to have the order of the learned Sessions Judge of Saran, dated 7th May 1919, set aside. The learned Judge by his order directed the petitioner to be prosecuted for an offence under S. 463, I. P. C. The facts upon which this application is founded may be briefly stated. A suit was instituted in the year 1915 bearing No. 21. It was a title suit between one Gokal Singh as plaintiff and Balaram Sahay as defendant. By this suit Gokal Singh sought to enforce his right to a sale of certain property under a sale-deed executed in the year 1914. The defence filed by Balaram Sahay to resist the suit was based upon a compromise effected in a previous mortgage suit; and by the defence in Suit No. 21 of 1915 it was pleaded that the sale-deed of 1914 had been annulled by virtue of the compromise. The compromise so referred to in the proceedings is Ex. 2, and the compromise bore date 21st November 1916. The compromise was filed in Court in the original mortgage suit and in effect operated as a decree in that suit.

When Gokal Singh ascertained the nature of the defence which had been asserted by Balaram Sahay in Suit No. 21 of 1915, he immediately observed that

the compromise referred to purported to annul and cancel the sale-deed. But on examination it was obvious that the compromise had been altered so as to make it appear that the sale-deed was annulled, which was never intended between parties in the prior mortgage suit in which the compromise had been arrived at. Accordingly Gokal Singh applied to the Subordinate Judge in Suit No. 21 of 1915 to direct the prosecution of Balaram for forgery. The learned Subordinate Judge granted sanction and accordingly Balaram was prosecuted.

The prosecution of Balaram Sahay came before the Deputy Magistrate on 10th March 1919 for trial, and he directed that the accused should be acquitted of the offence with which he was charged under S. 209, I. P. C., inasmuch as there was no reliable evidence against him in respect of the charge on which he had been tried. From the order of acquittal pronounced in favour of Balaram made by the Deputy Magistrate, Gokal Singh, applied to the Sessions Judge in appeal to reverse the order passed by the Deputy Magistrate, and in the course of this appeal at the suit of Gokal Singh against the order of the Deputy Magistrate, Mr. Monahan as Sessions Judge of the district of Saran directed that the petitioner Bachu Behari Lal should be prosecuted for an offence under S. 466, I. P. C.

The learned Sessions Judge in directing the prosecution of the petitioner purported to exercise the powers vested in him under S. 476, Criminal P. C. It is contended before me that the order of the learned Sessions Judge is erroneous and made without jurisdiction. Three contentions were put forward for the purpose of impeaching the order of 7th May passed by the learned Sessions Judge. First, it is contended that S. 476, Criminal P. C., incorporates within its terms all the provisions, limitations and qualifications specified in S. 195, Criminal P. C. That is to say, that the reference by incorporation to S. 195, in S. 476 Criminal P. C., is not merely confined to an enumeration of the sections of offences in respect of which a Court may direct a person to be prosecuted; but it also applies with regard to the qualifications as to the persons against whom proceedings may be taken. Therefore it is contended that inasmuch as the petitioner was not

a party to the Suit No. 21 of 1915 instituted by Gokal Singh that, therefore the Court had no power under S. 476 to direct his prosecution for an offence under S. 466, I. P. C.

Two authorities are cited in support of this contention, viz., the rulings reported as *Jadunandan Singh v. Emperor* (1) and *Kallaru Ramalingam, In re* (2). It is perfectly true that these two decisions are authorities in favour of the contention put forward on behalf of the petitioner. Mukerjee, J., in the case reported as *Jadunandan Singh v. Emperor* (1) gave an elaborate judgment, in which he enunciated the principle that in construing S. 476 a Court in exercising the powers conferred on it by that section must have regard to all the provisions and qualifications specified in S. 195, Criminal P. C. If the ruling referred to was the governing authority determining the law in this Province, no doubt the petitioner would be entitled to succeed in the application which he has made before me. However the ruling of Mukerjee, J., reported as *Jadunandan Singh v. Emperor* (1) has been dissented from in this Court. My learned brother Mullick, J., as a member of a Division Bench of this Court, has distinctly laid down in the case reported as *Abdul Sattar v. Emperor* (3) that S. 476 merely for the sake of abbreviation incorporates S. 195, Criminal P. C., within its terms *qua* the enumeration of offences only specifically mentioned in that section as offences under the Penal Code in respect of which the persons authorized by S. 476, Criminal P. C. may direct the prosecution of a person guilty of any such offences.

Apart from the two decisions to which I have referred reported as *Jadunandan Singh v. Emperor* (1) and *Kallaru Ramalingam, In re* (2), the weight of judicial authority seems to be in favour of the view of the ruling of the Division Bench of this Court. It is quite erroneous for learned counsel on behalf of the petitioner to state or argue, as he has done before me, that Mullick, J., failed to consider the importance and value of the judgments in the two reported cases which I have mentioned. Mullick, J., was emphatically

of opinion that the rulings in *Kallaru Ramalingam, In re* (2) and *Jadunandan Singh v. Emperor* (1) were not acceptable or binding as a correct interpretation of the law in this Province; and ample authority will be found in support of the view of my learned brothers in the following reported cases, viz., *Rajkumar Singh v. Emperor* (4), *Akhil Chandra Sen v. Queen-Empress* (5), *Ganga Ram v. Emperor* (6), *Devji, In re* (7) and *Keshav Narayan Manolkar, In re* (8). Therefore I hold that the first contention put forward by the petitioner is unmaintainable and that the learned Judge was entitled to direct his prosecution for forgery under S. 476 irrespective of the fact that he was not a party to the proceedings in Suit No. 21 of 1915 instituted by Gokal Singh against Balaram. The argument addressed to me by Mr. Varma is clear. His argument was that the learned Judge had no power under S. 476 to direct the petitioner's prosecution for an offence under S. 466, I. P. C., inasmuch as S. 466 is not specifically mentioned in S. 195, Criminal P. C.

This point was suggested by the Court when petition of admission in this matter was made to a Division Bench of this Court, and we allowed this point to be taken as an additional ground in revision by the petitioner's petition. I am satisfied however after careful consideration of the matter that there is no substance in this objection. S. 195 confers jurisdiction upon a Court to grant sanction to prosecute for an offence under S. 463, I. P. C. S. 463 is the general section which defines what forgery is, and that section is couched in wide and comprehensive terms and is intended, in my opinion, to apply to all classes and kinds of forgeries, howsoever committed. No doubt the offence charged under S. 466 against the petitioner is an offence of forgery of a Court record, a heinous and grave crime. This section deals only with a particular kind of the general species of forgery specified in S. 463. It would be almost absurd to hold that S. 463, which embraces all forgeries, is limited and restricted in its application so as to be in-

(1) [1909] 37 Cal. 250=11 Cr. L. J. 37=41 I. C. 710.

(2) [1915] 40 Mad. 100=16 Cr. L. J. 797=31 I. C. 653.

(3) [1918] 48 I. C. 894=20 Cr. L. J. 94.

(4) [1917] 1 P. L. J. 298=37 I. C. 487=18 Cr. L. J. 135.

(5) [1895] 22 Cal. 1004.

(6) [1917] 40 All. 21=42 I. C. 927=19 Cr. L. J. 15.

(7) [1894] 18 Bom. 581.

(8) [1912] 17 I. C. 720=13 Cr. L. J. 848.

applicable to the act of forgery committed within the meaning of S. 466. The point however is not without authority, and I express my concurrence with the view of the law stated in the case reported as *Queen-Empress v. Tulja* (9). The Calcutta High Court has also taken the same view in the case reported as *Teni Shah v. Bolahi Shah* (10), and in both these cases it has been held that S. 463 in its comprehensive and general terms covers an act of a particular kind of forgery which may constitute a separate offence under the specific enumeration of crimes provided for by the Penal Code. Therefore I hold that on the second contention submitted the argument of the petitioner must fail.

The third and last contention submitted for my consideration was that Mr. Monahan had no right to exercise the powers vested in him under S. 476, Criminal P. C., inasmuch as the matter out of which this prosecution has arisen did not come before him in the course of a judicial proceeding. This contention is, in my opinion, absolutely unsustainable. Gokal Singh preferred an appeal from the order of the Deputy Magistrate discharging Balaram Sahay of the offence with which he was charged under S. 209. In the course of that proceeding there was an appeal lawfully preferred to a proper Court; that Court was of opinion, in the course of that proceeding, that Balaram was not the person to be prosecuted, but that Bachu Behari Lal was. It would be impossible to hold in point of law or fact that the learned Judge did not become acquainted with the facts as to petitioner's participation in the act of forgery relied on to justify his prosecution in the course of a judicial proceeding. Accordingly I hold that the third argument submitted on behalf of the petitioner is unsustainable in point of law, and I accordingly reject this application and direct the prosecution of the petitioner to proceed forthwith. The learned Government Advocate asks for costs; this application is refused.

V.S./R.K. *Application rejected.*

(9) [1888] 12 Bom. 36.

(10) [1910] 5 I. C. 879=11 Cr. L. J. 280.

A. I. R. 1919 Patna 554

MULLICK AND ADAMI, JJ.

Gurumahadeva Asram Prasad Sahai—
Petitioner.

v.

Ram Sekhar Prasad Singh and others
—Opposite Parties.

Misc. Judicial Case No. 59 of 1919,
Decided on 30th May 1919.

Receiver—Sale of property—Auction-purchaser making payment of revenue—Sale set aside—Auction-purchaser can sue to recover amount spent by him from receiver—Civil P. C., O. 40, R. 1.

In a mortgage suit the High Court at the instance of the mortgagee plaintiff, appointed a receiver to take charge and possession of the mortgaged properties and to hold them for the benefit of the parties. The mortgaged properties were subsequently sold but the receiver was not discharged. The auction-purchaser considering himself the full proprietor and owner, continued to pay the revenue; the receiver at the same time also paid the revenue on behalf of the judgment-debtor. Four years afterwards the sale was set aside and the auction-purchaser applied to the Collector for refund of the amounts paid by him as revenue, and was met with the reply that the amounts were not available for refund; he then applied to the High Court for an order on the receiver to reimburse him for the amounts which were paid for the benefit of the estate and on behalf of the receiver it was contended that he was not subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court:

Held: (1) that the receiver having been appointed by the High Court to which he had submitted his accounts, must be regarded as an officer subject to the orders of that Court; (2) that so far as the auction-purchaser was concerned, he was justified in considering that he was the person liable to pay the Government revenue that became due during his auction-purchase, on the principle that he became the proprietor from the date of the sale and the duty of paying the revenue devolved upon him from that moment; (3) that under the circumstances the proper order was to give the auction-purchaser leave to sue the receiver in respect of his claim.
[P 555 C 1; P 556 C 1]

P. C. Manuk, Sailendra Nath Palit
and *Harnarain Prasad*—for Petitioner.
Atul Krishna Rai — for Opposite Parties.

Mullick, J.—This is an application by the Maharaja of Huthwa for an order from this Court directing the receiver in charge of the Manjha estate to pay to the Maharaja a sum of money, which is estimated to be about Rs. 27,000, and which is alleged to have been paid by the Maharaja into the Government Treasury in payment of land revenue between 11th June 1912 and 31st May 1916. It appears that a suit was brought upon a mortgage-bond by the proprietor of the

Paikpara Raj estate against the proprietors of the Manjha estate sometime previous to 1912, and that in that suit in consequence of certain covenants in the mortgage-deed a receiver was appointed at the instance of the mortgagee plaintiff to take charge and possession of the mortgaged properties and to hold them for the benefit of the parties. The receiver appears to have been appointed by the High Court of Calcutta in the course of an appeal against an order of the Subordinate Judge, before whom the mortgage suit was pending, refusing to appoint a receiver.

It has now been contended before us that the receiver was not a receiver subject to the orders of the High Court but that he was an officer subject to the orders of the trial Court. It seems that the original receiver, Babu Chander Sekhar Prasad Singh, was appointed by the High Court and that his accounts were submitted to that Court. He has since died and the present receiver, Babu Ram Sekhar Prasad Singh, his brother, has been appointed by this Court to carry on the duties of the office. In the case of *Rani Debendra Balla Dassi v. Babu Chandra Sekhar Prasad Singh* (1), the question whether the receiver was to be viewed as an officer subject to the orders of the Subordinate Judge was raised before a Division Bench of this Court but was not decided. So far as the present proceedings are concerned, it seems quite clear that the receiver must be regarded as an officer subject to our orders, and it is on that footing that the applicant before us asks for an order directing the receiver to pay to the applicant the money which he paid into the Government Treasury on account of land revenue. To return to the history of the mortgage suit, it seems that on 11th June 1912, the mortgagee brought the mortgaged properties to sale and that the properties were purchased by the Maharaja of Huthwa for a sum of Rs. 6,00,000 or thereabouts. Considering himself the full proprietor and owner of the property, the auction-purchaser continued to pay the land revenue due upon it till 31st May 1916, when the auction-sale was set aside.

The receiver, who ought to have been discharged as soon as the sale, was however not discharged by the Court and he

is still in office by reason of the fact that the execution of the mortgage decree is still being carried out. It appears that while the auction-purchaser was paying the Government revenue which he thought was due from him as sole proprietor, the receiver was at the same time also paying it on behalf of the judgment-debtor, with the result that there have been double payments which the Collector has applied in liquidation of his claims against other cosharers in the estate; so that when the auction-purchaser applied to the Collector for the refund of the amounts paid by him he was met by a reply that the amounts were not available for refund. He accordingly makes the present application to this Court for an order in the first instance upon the receiver to reimburse him for the amounts which, according to his contention were paid for the benefit of the estate. Their Lordships of the Privy Council in the case of *Bhavani Kaur v. Mathura Prasad Singh* (2), held that the mortgage purchaser becomes the proprietor from the date of the sale and that the duty of paying the Government revenue devolves upon him from that moment. The learned vakil for the receiver contends that that principle only applies to a case where the sale is subsequently confirmed, but in the judgment of their Lordships there is no limitation of this kind placed upon the rights and liabilities of a mortgagee auction-purchaser, and I take it that so far as the present auction-purchaser is concerned, he was justified in the view that he was the person liable to pay the Government revenue that became due after his auction-purchase.

Mr. Manuk on behalf of the auction-purchaser also draws our attention to the case of *Dakhina Mohan Roy v. Soroda Mohan Roy* (3), where their Lordships observed that a person who has been adjudged to have a title to a property and under such colour of title pays in Government revenue for the benefit of the estate, even though his collections from the estate are less than the amount of the Government revenue paid by him, he is entitled in the event of his title being afterwards set aside by a higher tribunal, to a refund of the difference bet-

(2) [1913] 40 Cal. 89=39 I. A. 228=16 I. C. 210 (P.C.).

(3) [1894] 21 Cal. 142=20 I. A. 160 (P.C.).

(1) [1916] 35 I. C. 589.

ween the amount paid him and the amount collected by him on account of rent from the estate. Here it is contended that all the payments made by the auction-purchaser were for the benefit of the estate and that therefore the applicant should be re-imbursed in full by the receiver. The learned vakil for the receiver suggests that we should hold this matter up for the appearance of the decree-holder, who has not been served with notice of this petition.

I agree that the decree-holder is vitally interested in the matter, because any surplus money remaining in his hands has by the direction of the Court which appointed the receiver, to be paid by the receiver to the decree-holder, but it is not necessary to delay the decision of this matter any longer, in particular as a question of limitation is involved, because we think that the proper order that we should make is, not the receiver should make the payment which is claimed, but that liberty should be given to the auction-purchaser petitioner to sue the receiver according to law. It is no doubt true that a Court can adopt the procedure which is most convenient for determining the claims which are made before it and can, if necessary, investigate the merits of the auction-purchaser's demand, but having regard to the various questions of the limitation and the rights and liabilities of the auction-purchaser as against the receiver that may arise in the course of the investigation, we think that the most convenient course will be to leave the auction-purchaser to have the matter litigated by a separate suit. Leave is accordingly given to the auction-purchaser to sue the receiver in respect of his claim. The application is therefore allowed with costs. Hearing-fee three gold mohurs will be paid out of the funds of the estate.

Adami, J.—I agree.

V.S./K.K. *Application allowed.*

A. I. R. 1919 Patna 556

ATKINSON AND JWALA PRASAD, JJ.

Pheku Jha—Complainant—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 117 of 1919, Decided on 9th May 1919, against order of Addl. Sess. Judge, Muzafferpur, D/- 21st March 1919.

Criminal P. C (1898), Ss. 408, 413 and 439
— Joint trial—Appealable and non appealable sentence—Accused entitled to appeal appealing—High Court has ample powers to deal with cases reported to it or coming to its notice.

Per *Atkinson, J.*—Where two or more persons are jointly tried together for the same offence and one is convicted and awarded an appealable sentence, and the others are convicted and awarded non-appealable sentences, and the convict entitled by virtue of his sentence to appeal does appeal, the law does not warrant under such appeal the right to re-open the trial as an appeal in favour of those who have been convicted and awarded non-appealable sentences; in other words these latter have no right of appeal, and so far as they are concerned the correct procedure is to refer the matter to the High Court for its consideration in the exercise of its revisional jurisdiction. [P 557 C 2]

Per *Jwala Prasad, J.*—In such cases the accused who are awarded non-appealable sentences have the right of appeal along with the accused who have received an appealable sentence. [P 560 C 2]

By the Court.—The High Court has ample power under S. 439 to deal with a case reported to it for orders, or which otherwise comes to its knowledge. [P 560 C 2]

Abdul Majid—for Petitioner.

Gour Chandra Pal—for the Crown,

Atkinson, J.—This application comes before us in revision from an order of the learned Additional Sessions Judge of Muzafferpore dated 21st March 1919. It would appear that fifteen persons were charged before the learned Sessions Judge with an offence under S. 379, I. P. C., read with S. 149, I. P. C. The case was tried by Mr. Owen, the Subdivisional Officer of Sitamarhi and he convicted all the accused and sentenced the accused Khobari, the ringleader, to a period of six months' rigorous imprisonment; and of the remaining fourteen accused persons he convicted and sentenced four to pay a fine of Rs. 15 and ten to a fine of Rs. 30 respectively. An appeal was presented to the learned Additional Sessions Judge on behalf of Khobari Koeri who had been convicted and awarded a period of six months' rigorous imprisonment, which is an appealable sentence. It was contended on behalf of the petitioner before the learned Sessions Judge that the remaining fourteen accused who were not appellants before the Sessions Judge had no remedy in respect of their conviction and sentences save by way of reference to the High Court. The learned Sessions Judge however held that inasmuch as Khobari was convicted and award-

ed an appealable sentence that, therefore the whole case was open in respect of all the accused persons, and that he was at liberty to consider the propriety of the conviction and sentences of the other fourteen co-accused persons other than Khobari who were convicted and awarded non-appealable sentences.

The ruling of the learned Sessions Judge was challenged, and we allowed notice to issue for the purpose of considering the propriety of the aforesaid ruling of the learned Judge. In substance the learned Judge's ruling amounts to this: that whenever two or more accused persons are jointly tried together and one is convicted and awarded an appealable sentence, and the others are convicted and awarded non-appealable sentences, and the accused entitled by virtue of his sentence to appeal does appeal, that then and in such event the whole case is open in its entirety even in favour of the accused persons who have been only awarded nonappealable sentences. This conclusion involves a consideration of two important sections of the Code of Criminal Procedure. S. 408 in general terms confers a right of appeal in all criminal proceedings culminating in conviction and sentence and it runs as follows:

"Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the first class, or any person sentenced under S. 349 by a Magistrate of the first class, may appeal to the Court of Session."

It is not material for the purposes of this case to consider the provisos to S. 408. S. 408 is only material in so far as it confers an absolute and unqualified right of appeal in all cases tried by the respective officers specified in the section itself. The important section however to consider is S. 413 and to ascertain what bearing it has in modification of the general provisions of S. 408. S. 413 provides as follows:

"Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the first class passes a sentence of imprisonment not exceeding one month only, or of fine not exceeding Rs. 50 only, or of whipping only."

Section 413 therefore *prima facie* modifies and abridges the general and unqualified right of appeal conferred by S. 408; and consequently S. 408 must be read and construed subject to the limitations

and qualifications expressed in S. 413. Thus if a person be convicted of an offence and he be sentenced to a period of imprisonment of less than one month, or to pay a fine of a sum not exceeding Rs. 50, whether tried alone or jointly with others for the same offence and even though his co-accused may be convicted and receive a sentence of an appealable character, yet he has no right of appeal. To hold otherwise would render S. 413 meaningless. The opening words of S. 413 are the governing words which control the operative construction to be given to S. 413 itself. The opening words of that section are vitally important because they restrict, cut down and abridge in express and general terms whatever more extended right may ostensibly have been conferred by S. 408, "Notwithstanding anything hereinbefore contained." Speaking for myself, I am satisfied that if two or more persons are tried jointly, and some are convicted and awarded non-appealable sentences and others are convicted and awarded appealable sentences, and such persons as have been convicted and awarded appealable sentences appeal, the law does not warrant under such appeal the right to re-open the trial as an appeal in favour of those persons who have been convicted and awarded non-appealable sentences. In my opinion, there is no doubt as to what the law is as it now stands. Some debate or argument has been founded upon some subtle meaning to be attributed to the word "cases" as employed in the wording of S. 413. In my opinion the word "cases" leads to no difficulty or embarrassment at all in construing S. 413. I think that the word "cases" in S. 413 applies to all cases, whether they be summons cases, warrant cases, or trial cases. The word "cases" is used in its widest and most extensive sense to cover the trial of all cases in respect of which an accused person may be convicted. In British India the law appears to be substantially uniform at the present time as to the construction to be applied to S. 413 read as a general modification of the wide and extensive provisions of S. 408, Criminal P. C.

It is true that in a Full Bench ruling reported as *Ba Thaw v. Emperor* (1), the chief Court of Burma took a different view to that which I have expressed, but

(1) [1907-08] 1 L. B. R. 354.

the reasoning of that decision does not appear to me to be sound nor does it commend itself to me. Therefore I feel unable to follow it, more especially when I have decisions of various High Courts in India which appear to me to be more in accordance with the true interpretation and construction of the Code of Criminal Procedure itself. A note of dissent was recorded by Piggott, J., of the Allahabad High Court in the ruling reported as *Lal Singh v. Emperor* (2). Piggott, J., in that case was most emphatic in his expression of opinion sitting as a Single Judge of the Allahabad High Court, that where one accused person was convicted and awarded an appealable sentence and he appealed, that by reason of such appeal the right and benefit of an appeal was also given in favour of the co-accused who were convicted and awarded non-appealable sentences. Sir George Knox, of the Allahabad High Court however while acting as Chief Justice of that Court declined to accede to the decision of Piggott, J., in the case previously cited, and accordingly Sir George Knox in a ruling reported as *Husain Khan v. Emperor* (3) held that an accused person who has received a non-appealable sentence did not derive any right of appeal because of the fact that his co-accused tried jointly with him had received a sentence which was appealable. Sir George Knox decided the case as a single Judge in the year 1916. In the same volume of the Allahabad Reports will be found another case decided by Piggott, J., reported as *Bhola v. Emperor* (4), in which Piggott, J., unequivocally resiles from the position which he took up in the previously cited case, *Lal Singh v. Emperor* (2), and there Piggott, J., said:

"I take this opportunity of stating that, although I have myself expressed and acted upon the view that the provisions of S. 413 aforesaid do not operate so as to take away the right of appeal, which would otherwise be conferred in any case tried by a Magistrate of the first class to the Court of Session by S. 408. I find that this view has not been generally accepted in this Court and has been expressly dissented from by the present acting Chief Justice. I do not propose therefore further to insist on my own individual view in this matter."

Therefore I take it that in the Allahabad High Court, at least, the matter has now been decided beyond the

region of cavil or dispute. A ruling is also to be found in *Reg. v. Kalubhai Meghabhai* (5). That was a decision given in the year 1870; and the learned Judges constituting the Court were Westropp, C. J., and Lloyd, J. The same point there, as here, was taken and the learned Judges without hesitation set aside the order of the Sessions Judge, who had held on similar facts that a right of appeal existed on behalf of persons who were convicted and had received a non-appealable sentence, with others who had received appealable sentences, and had appealed.

Consequently, in my opinion, the order of the learned Sessions Judge was wrong in law and without jurisdiction, in so far as he dealt with the cases of the fourteen accused persons who were convicted and awarded non-appealable sentence. The learned Sessions Judge should have, in the ordinary exercise of his jurisdiction so far as such accused persons were concerned, referred the matter to the High Court for its consideration in the exercise of the revisional powers vested in it. Therefore so far as the order of acquittal of the fourteen accused persons who received non-appealable sentences is concerned as declared by the learned Sessions Judge the same must be set aside.

We indicated when we granted the rule sought in this case that we would examine the record for ourselves for the purpose of seeing whether the case was one in which the conviction as against the aforesaid fourteen accused persons should be set aside. We have considered the judgment of the learned Sessions Judge very carefully and the judgment of the trial Magistrate, and we have examined the evidence on the record itself, and having perused the evidence and giving due weight to the considerations which have been placed before us on behalf of the petitioner, we have no hesitation in saying that we both agree in holding that the accused were properly acquitted in the sense that on the merits no conviction ought to be maintained against them. Accordingly we now, in exercise of our powers in revision, set aside the order of conviction pronounced by the learned trial Magistrate by his order dated 7th February 1919 and direct that if the fines awarded against the aforesaid accused respectively have been

(2) [1916] 38 All. 305=36 I. C. 481.

(3) [1917] 39 All. 293=39 I. C. 690.

(4) [1917] 39 All. 549=40 I. C. 332.

(5) [1870] 7 B. H. C. R. 351 Cr.

paid, that the same be forthwith refunded.

Jwala Prasad, J.—The complainant Pheku Jha moves this Court for setting aside the order of acquittal of the opposite party, 14 in number, passed by the Additional Sessions Judge of Muzafferpur by his judgment dated 21st March 1919. These 14 persons along with one Khobari Koeri were convicted by the Subdivisional Magistrate of Sitamarhi by his judgment, dated 7th February 1919, under Ss. 149 and 379, I. P. C. Khobari was held by the Magistrate to be the ringleader in committing the theft of the crops in question and was sentenced to six months' rigorous imprisonment and a fine of Rs. 50. Out of the remaining 14, four were sentenced to a fine of Rs. 15 each and the rest to a fine of Rs. 30 each. Khobari appealed to the Sessions Judge and the remaining fourteen applied to the Sessions Judge for recommendation under S. 438 to the High Court for setting aside their convictions and sentences. The learned Sessions Judge held that the paddy said to have been removed was sown by him and hence the charge of theft was not at all established. He acquitted Khobari and treating the application of the remaining fourteen accused as an appeal he acquitted them as well.

Mr. Majid on behalf of the complainant contends that the order of the Sessions Judge acquitting these fourteen persons is without jurisdiction, inasmuch as the sentence passed against each of them was below Rs. 50 and hence non-appealable. The contention is based upon S. 413, Criminal P. C., which purports to enact that there shall be "no appeal in petty cases," vide the marginal note in the present Code as well as in the old Codes of 1882 and 1872. The right of appeal to the Sessions Judge is conferred by S. 403 upon:

"any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the First Class or any persons sentenced under S. 349 by a Magistrate of the First Class."

Section 413 purports to curtail this right:

"by a convicted person in cases in which a Court of Session or the District Magistrate or other Magistrate of the First Class passes a sentence of imprisonment not exceeding one month only or of fine of Rs. 50 only or of whipping only."

The Subdivisional Magistrate who tried the case passed a sentence of six months against one of the accused persons and a fine of less than Rs. 50 against each of the remaining persons so that it cannot be said that in the case tried by the Magistrate he passed a sentence not exceeding the limit prescribed by the section for an appeal. Learned counsel however contends that the words in S. 413, Criminal P. C., quoted above should be construed as curtailing the power of appeal "by a convicted person" in cases in which the Courts specified in the section pass a sentence upon him such as is mentioned therein, though in the same case he may have passed a sentence beyond the said limit upon the other convicted persons. This is only possible by adding the words "upon him" after the word "passes" and before the words "a sentence" in the section. We have no authority in interpreting a section to add words to the section which the legislature did not think fit to do, specially when the addition of the words would curtail an undoubted and substantial right by the statute in clear and unambiguous terms such as the right of appeal given by S. 408 of the Code. If the legislature meant to curtail the said right of appeal it would not have been difficult for it to do so by adding the said words in the section or in any other way.

There is another reason why we are not justified in adding any expression to the section which is not there for the addition of such an expression would cause an obvious anomaly, inasmuch as the narrow interpretation of the section suggested by the learned counsel would deprive an accused person as in the present case who was supposed to have taken a secondary part in the offence of the right of appeal on facts, whereas the ringleader who took a serious part in the committing of the theft would be allowed to do so and to prove his innocence by appealing on facts. We have to interpret the statute as it is and we cannot possibly add to it nor narrow its scope meaning and application. It has then been suggested that the opening words in S. 413, Criminal P. C., "Notwithstanding anything hereinbefore contained" curtail the right of appeal conferred by the preceding S. 408. This is so but the question is to what

extent and in what manner S. 408 is controlled by S. 413. To my mind the latter section curtails the former only in cases in which there is no sentence upon any convicted person above the limit prescribed by S. 413, so that if any of the convicted persons in the same case has received a punishment above that limit, the right of appeal given in S. 408, upon a convicted person receiving a sentence below the limit is not at all curtailed, but that he along with the one who received a higher punishment has the right uncontrolled and uncurtailed. The interpretation is also borne out by referring to proviso (b) to S. 408 of the Code. That proviso says that when in any case an Assistant Sessions Judge or a Magistrate specially empowered under S. 30, passes any sentence of imprisonment for a term exceeding four years or any sentence of transportation, the appeal shall lie to the High Court. The words in this proviso are similar to those in S. 413. Under the said proviso (b) it has been held that where some of several accused persons are sentenced to imprisonment exceeding four years, those sentenced to less terms have the right of appeal to the High Court, *Palani Koravan v. Emperor* (6), *Hardit Singh v. Emperor* (7), *Richha v. Emperor* (8), and *Har Dayal v. Emperor* (9). This is the test how S. 413, should be construed and it is, as I have said above, the maximum sentence passed upon any one of the convicted persons that determines the right of appeal in that case by the said person as well as those who received petty sentences as mentioned in that section. There has been a conflict of opinion regarding the interpretation of the section. A Full Bench of the Burma Court in the case of *Ba Thaw v. Emperor* (1), held that where on a trial of several persons one is awarded an appealable sentence, the others who have got non-appealable sentences may appeal.

The Oudh case of *Sheopal v. Emperor* (10), was to the same effect. So also the case of *Lal Singh v. Emperor* (2) and *Emperor v. Jaisukh* (11).

Piggott, J. who decided the case of *Lal Singh v. Emperor* (2), however modified his view considerably in the case of *Husain Khan v. Emperor* (3), where a contrary view was expressed. The Madras Court has also taken a contrary view. The fact that there has been a conflict of opinion in the interpretation of the section by several eminent Judges goes to show that the section is capable of both the interpretations, and it is consonant with rules of construction of a statute that the interpretation favourable to the right expressly conferred upon a subject should be accepted and acted upon as being the true intention and meaning of the legislature. In this view also the right of an accused person should not be curtailed unless it is purported to be done by clear expressions in the statute. The practice in this matter appears to be not uniform. Some of the Sessions Judges in such cases recommend to the High Court under S. 438, while the others deal with them along with the appeal of persons given sentences beyond the limit prescribed by S. 413, and dispose them of themselves. In the case of *Kanchan Mallik v. Emperor* (12), it would appear from the facts stated therein that a convicted person who had received a fine of S. 25 each under two charges appealed to the Sessions Judge along with those who had received sentences of three months' rigorous imprisonment and fines. I am therefore not prepared to hold with my learned brother that the Sessions Judge had no jurisdiction to treat the application of the 14 accused persons, the opposite party, as an appeal while dealing with the appeal of Khobari who had, undoubtedly, received an appealable sentence of six months.

Assuming for the sake of argument that the Sessions Judge should not have acquitted these persons but should have recommended their case to the High Court for acquittal, I think that the conviction of these accused by the sub-divisional Magistrate cannot be sustained. The case is one in which the High Court is justified in going through the evidence and to see if the conviction was proper. Upon the evidence it is impossible to hold that the complainant has proved that the crop in question said to have

(6) [1907] 17 M. L. J. 246.

(7) [1911] 10 I. C. 278.

(8) A. I. R. 1915 All. 20=28 I. C. 737.

(9) A. I. R. 1915 All. 356=37 All. 471=30 I. C. 158.

(10) [1913] 15 O. C. 386=19 I. C. 170.

(11) [1916] 16 P. R. 1916 Cr.=33 I. C. 653.

(12) A. I. R. 1915 Cal. 187=42 Cal. 374=26 I. C. 134.

been removed by the accused was sown by him. As a matter of fact, the trial Magistrate has disbelieved the prosecution witnesses and has held that they have not shown themselves incapable of telling falsehood in order to help out the case. He has not found that the complainant was in possession, or had sown the crop in question. Upon the finding of the trial Magistrate himself the conviction cannot be sustained and must be set aside. The High Court has got ample power under S. 439, which empowers the Court to deal with a case which has been reported for orders or "which otherwise comes to its knowledge," and the powers given to the Court in revision are those conferred on a Court of appeal amongst others by S. 423 of the Code.

It does not matter that the case has come to us upon an application made by the complainant. The record is here and this Court has got seisin of the entire case and is competent to revise the order passed by the Courts below. In a long series of cases it has been held that the High Court has power in a proper case to set aside the conviction and sentence of an accused person who did not appeal while considering the case of those who did: *Queen v. Jaffir Ali* (13) and *Broja Rakhal Mozumdar v. Empress* (14). Though this is not the case here, yet the principle of that ruling is that it does not matter in whatever way the record comes to the High Court, it has power of revision under S. 439. I therefore agree with the order proposed by my learned brother that the application of the complainant should be rejected and that the acquittal of the accused should not at all be disturbed.

V.S./R.K. *Application rejected.*

(13) [1873] 19 W. R. Cr. 57.

(14) [1901] 5 C. W. N. 330.

* A. I. R 1919 Patna 561

DAWSON-MILLER, C. J. AND JWALA PRASAD, J.

Madhab Koeri—Appellant.

v.

Baikuntha Karmaker and others—Respondents.

Letters Patent Appeal No. 56 of 1918, Decided on 7th July 1919, from decision of Ali Imam, J., D/- 9th April 1918.

* Contract Act (9 of 1872), S. 11—Mortgage in favour of minor—Suit by minor is

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maintainable — Transfer of Property Act (1882), S. 7.

There is nothing in law to prevent a minor in whose favour a mortgage has been executed from suing to recover the money, principal and interest, advanced by him on the mortgage.

[P 563 C 2]

Abani Bhusan Mukharji — for Appellant.

Surendra Mohan Das — for Respondents.

Dawson-Miller, C. J.—This is an appeal under Cl. 10, Letters Patent, from a decision of a single Judge of this Court dated 9th April 1918, affirming a decision of the Subordinate Judge.

On 7th April 1908 the defendant executed a mortgage bond in favour of Baikuntha Karmaker and Ghasi Ram Karmaker, plaintiffs 1 and 3 who were minors, to secure payment of a loan of Rs. 200. Plaintiff 2 Bhuban Karmaker, is the father of plaintiff 1 and claims that the latter was merely his benami-dar in the mortgage transaction. On 28th July 1915 the plaintiffs instituted the present suit claiming a sum of Rs. 389 principal and interest due under the said bond. The defence to the suit was first, that it was barred by res judicata, and secondly, that the mortgage being in favour of minors was void and could not be enforced. The Munsif before whom the case originally came decided both points in favour of the defendant and dismissed the suit. He further found that the mortgaged property, being an ordinary raiyati holding situate within a district governed by the Chota Nagpur Tenancy Act, was not liable to sale under the provisions of that Act.

The Subordinate Judge overruled the Munsif on both points but having regard to the provisions of the Act referred to, considered that he could not pass a mortgage decree granting a sale of the property but decreed the suit as a money decree for the amount claimed. The claim of plaintiff 2 was not established. On appeal to this Court the learned Judge dismissed the appeal with costs. Hence the present appeal. So far as the question of res judicata is concerned, the judgment relied upon in support of this plea has not been placed before us by the appellant but the material facts relating to it may be gathered from the judgment of the lower Courts. It appears that the mortgage bond in question was in the custody of one Dwarika Lohar

the plaintiffs' agent, who had received interest amounting to Rs. 63 from the defendant for the year 1911. He refused to deliver up the bond or to pay the interest received to the plaintiffs, who on 28th February 1911 instituted a suit against Dwarika Lohar and the present defendant claiming the sum of Rs. 63 received as interest from Dwarika Lohar and delivery up of the mortgage bond by him to the plaintiffs, with an alternative prayer that if it should be found that Dwarika Lohar and the present defendant were in collusion then the whole amount of the money covered by the mortgage should be adjudged to the plaintiffs. The Subordinate Judge passed a money decree against both the defendants. From this decision Dwarika appealed to the High Court in Calcutta. The High Court only dealt with the first part of the plaintiff's claim and made a decree for the delivery up of the mortgage bond by Dwarika Lohar and payment by him of the interest received. With reference to the alternative part of the plaintiffs' claim the Court observed that after obtaining possession of the bond it would be open to the plaintiffs to take proceedings against the present defendant for enforcing their security, but in the course of the judgment there is a dictum to the effect that as the plaintiffs were minors the mortgage would be void. The defendants now contend that this decision operates as *res judicata* and bars the plaintiffs' claim in the present suit. It will be observed that the present defendant was not actively a party to that appeal and was apparently content to rest satisfied with the decision of the Subordinate Judge, secondly, the liability of the present defendant under the bond was not a matter which was determined in that appeal but was expressly left undecided and any expression of opinion in that judgment as to the validity of the mortgage would not, in my opinion, be binding as between the present plaintiffs and defendant.

With regard to the second point the appellant relied upon the case of *Mohori Bibee v. Dharmodas Ghose* (1), where their Lordships of the Privy Council decided that a mortgage granted by an infant in favour of a money lender to secure money advanced to the minor was void and that notwithstanding Ss. 64

and 65, Contract Act, the mortgagee was not entitled to recover back from the minor any portion of the money advanced. The actual decision in that case was that an infant was not a person competent to bind himself by a contract of the description then under consideration. In dealing with the effect of Ss. 38 and 41, Specific Relief Act, their Lordships held that those sections no doubt gave a discretion to the Court, but the Court of first instance and subsequently the appellate Court in the exercise of such discretion came to the conclusion that under the circumstances of the case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy and they saw no reason for interfering with the discretion so exercised. It appears from the report of that case that the mortgagee's attorney, whilst the negotiations for the mortgage by the minor were proceeding, received definite instructions from the minor's mother that he was an infant and that any one lending him money would do so at his own risk and peril. Nevertheless, the respondent proceeded with the transaction, obtained the mortgage and induced the infant to sign a declaration stating that he was then of age. It is obvious that, in such circumstances, the respondent, who entered into the transaction with full knowledge that he was dealing with a minor, was not entitled to any consideration at the hands of the Court in their discretion under the sections of the Specific Relief Act referred to.

This judgment was the subject of consideration by a Full Bench of the Madras High Court in the case of *Raghava Chariar v. Srinivasa Raghava Chariar* (2), where the question for consideration was whether a mortgage executed in favour of a minor who had advanced the whole of the mortgage money was enforceable by him or by any other person on his behalf. The learned Judges of the Madras High Court came to the conclusion that the decision of their Lordships of the Privy Council referred to did not affect the question, whether a transfer by way of mortgage in favour of the minor was enforceable. They pointed out that there was nothing to prevent a minor from acquiring full ownership of property or of a mortgage interest in immovable pro-

(1) [1903] 30 Cal. 539=30 I. A. 114 (P. C.).

(2) [1916] 40 Mad. 308=36 I. O. 921. (F.B.).

perty by way of gift or inheritance, and that although under their Lordships' decision a minor could not bind himself by contract to pay the price or advance the mortgage money, there was no reason why, when once the consideration for a sale had been paid by the minor or a loan advanced by him, a transfer or a mortgage executed in his favour in consideration of the price paid or the loan advanced should not take effect. They accordingly overruled the previous decision of the same Court in *Navakoti Narayan Chetty v. Loyalinga Chetty* (3), to the effect that a sale made in favour of a minor was void and not merely voidable at his option. It may be pointed out in passing that Benson, J., one of the Judges who decided *Navakoti Narayana Chetty v. Loyalinga Chetty* (3), was also a member of the Bench which decided the later case of *Rungarazu Sathrurazu v. Mad-dura Basappa* (4), where it was held that a promissory note executed in favour of a minor who sued upon it was not void but only voidable provided that the minor had not subjected himself to a detriment by accepting the note and so incurring liability upon it. In the course of his judgment in *Raghava Chariar v. Srinivasa Reghava Chariar* (2) the learned Chief Justice Sir John Wallis points out:

"The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money. This precise question cannot arise in England where a purchase by a minor of immovable property is voidable by him on attaining majority but not void ab initio, as it is only the contracts specified in the Infants Relief Act which are void. However even in the case of a contract which was void under the Infants Relief Act, Lord Coleridge, C. J., and Bowen, L. J., held that a reasonable construction must be put upon the Statute and that when an infant had paid for something under a void contract and had used or consumed it, it would be contrary to natural justice that he should recover back the money which he had paid on the ground that the contract was void, *Valentini v. Canali* (5). I do not think this decision is inconsistent with *Nottingham Permanent Benefit Building Society v. Thurston* (6), which decided, as I understand it, that the mortgage given by the minor as security for void contract entered into by him was also void. Applying the same reasoning to the present case it would be even more opposed to natural justice to allow the

transferor to a minor by way of sale or mortgage to question the transfer for which full consideration has been paid to him."

The present case is not one of an executory contract where the minor has bound himself by any contractual obligation. He has advanced the whole of the mortgage money and in return therefore the mortgage has been executed in his favour. He is subject to no further obligation and merely claims to exercise the rights incidental to the transfer to him by that mortgage. There is no contract by the minor which still remains to be performed as in the case of *Mohori Bibee v. Dharmodas Ghose* (1) (*ubi sup.*), and the reasoning which is at the root of all the cases relating to the contractual obligations of minors appears to me to have no application to the present case. It was held by the Allahabad High Court in the case of *Munni Koer v. Madan Gopal* (7) that there was nothing in law to prevent a minor from becoming a transferee of immovable property and hence a minor in whose favour a valid deed of sale had been executed was competent to sue for possession of the property conveyed. It was contended on the authority of *Mohori Bibee v. Dharmodas Ghose* (1) that the contract for the sale of the house was absolutely null and void, but the Court found that where the purchase money had been paid and the conveyance executed, the minor became entitled to possession of the property and could successfully sue for possession.

It was pointed out in that judgment that different considerations would arise if after having agreed to sell the property, the defendant before receiving the price, had refused to execute a conveyance and the minor plaintiff had been driven to a suit for specific performance. The case of *Narain Das v. Dhanaia* (8), where a minor in whose favour a registered sale deed had been executed was permitted to sue to recover possession of the purchased property upon tender of the balance of the purchase money, is another instance where the Allahabad High Court held that a contract entered into in favour of a minor whereby he acquired an interest in immovable property was not void. Again in *Hari Mohan (Bhagabhor) Mondal v. Mohini Mohan Banerjee* (9) the High Court of Calcutta decided

(3) [1909] 33 Mad. 312=1 I. C. 382.

(4) [1913] 18 I. C. 968.

(5) [1889] 24 Q. B. D. 163.

(6) [1903] A. C. 6.

(7) [1915] 38 All. 62=31 I. C. 792.

(8) [1916] 38 All. 154=35 I. C. 23.

(9) [1916] 33 I. C. 994.

liability as against the minor. These cases do not apply to a completed contract where the minor's obligation has been wholly performed resulting in the transfer to him under the contract of an interest in property.

[illegible]

benefit of the sum advanced by the plaintiffs under it and in such circumstances it would be within the competence of the Court under S. 41, Specific Relief Act, in granting relief to the defendant to make him pay such compensation as justice may require.

Their Lordships of the Judicial Committee in the case of *Mohori Bibee v. Dharmodas Ghose* (1) (*ubi sup.*) appear to have considered that the said section would have been applicable to the case then under consideration, had justice required that they should exercise their discretion in favour of the appellant. If the contention of the appellant in the present case should be upheld, it would follow that the law relating to the contracts of minors which is meant for their protection would in numerous cases have an exactly opposite effect and result in manifest injustice. To take a simple instance, if a minor agreed to sell a horse and in pursuance of the agreement delivered it to the purchaser before payment of the price, the purchaser would be entitled to keep the horse and refuse to pay the purchase money on the ground that the contract was void and unenforceable; or again if a minor sent a money order to a shop-keeper in payment of certain selected goods to be forwarded, the shopkeeper could keep the money and refuse to deliver the goods. In the cases supposed the purchaser and the shopkeeper might be within their rights in refusing to complete the contract entered into with a minor, but justice demands that they should at least restore the horse in the one case and the money in the other. Here the appellant has had the benefit of the loan and even if the contract should be declared void, justice demands that he should make compensation to the minor which would include the principal and interest claimed. In my opinion the appeal should be dismissed with costs.

Jwala Prasad, J.—I agree.

V.S./R.K.

Appeal dismissed.

A. I. R. 1919 Patna 565

DAS, J.

Yusuf and others—Petitioners.

v.

Bunilal Mandal—Opposite Party.

Criminal Misc. Case No. 20 of 1919,
Decided on 16th May 1919, for transfer of
a case from file of Subdivl. Officer, Araria.

Criminal P. C. (1898), S. 526—Grounds—Stopping cross-examination of complainant is ground for transfer.

It is very important for Magistrates to remember that lawyers in charge of cases of accused persons have a large discretion in the way they should conduct the defence of accused persons. The position of accused persons is at all times of grave anxiety and Courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety. [P 565 C 2]

Where a trying Magistrate stopped the cross-examination of the complainant in a case because in his view the complainant had been fully cross-examined for one hour:

Held: that the Magistrate was guilty of an act of indiscretion which could reasonably lead the accused to believe that they would not get a fair trial at his hands and that the case should be transferred to the Court of some other Magistrate. [P 565 C 2]

Athar Hussain—for Petitioners.

Asst. Government Advocate—for Opposite Party.

Judgment.—I think that it is expedient that there should be a transfer of this case. In making this order I ought to say that in my opinion, the learned sub-divisional officer was not really guilty of any bias towards the accused persons, but he was, undoubtedly, guilty of an act of indiscretion which may reasonably lead the accused persons, and in this case has led them to believe that they would not get a fair trial at the hands of the learned sub-divisional officer. I do not think he should have stopped the cross-examination of the complainant who was certainly the most important witness on behalf of the prosecution. I have read the cross-examination of the complainant and I am unable to say that there was anything irrelevant in that cross-examination, or that it was a cross-examination of obstruction as the learned sub-divisional officer says. It is very important for the Magistrates to remember that lawyers in charge of cases of accused persons have a large discretion in the way they should conduct the defence of accused persons. As I said in a case which I decided the other day, the position of accused persons is at all times one of grave anxiety and Courts trying these cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety.

I therefore transfer this case to the learned District Magistrate of Purneah who, if he chooses, may try the case himself or make it over to some Deputy

Magistrate competent to try the case. Whoever tries the case will give an opportunity to the accused persons to cross-examine the complainant and the case will proceed from that stage.

V.S./R.K.

Case transferred.

A. I. R. 1919 Patna 566

COUTTS AND DAS, JJ.

Hanuman Bux and others—Plaintiffs—Appellants.

v

Lal Nilmoni Nath Sahi Deo—Defendant—Respondent.

Second Appeal No. 1194 of 1917, Decided on 2nd July 1919, against decision of Judicial Commissioner, Chota Nagpur.

Contract Act (9 of 1872), Ss. 16 and 74—Something unconscionable either in original dealing or in subsequent transaction must be shown—Original rate of interest 3 per cent per month—Stipulation to pay 6 per cent per month on default held to be in nature of penalty.

A mortgage bond provided that interest should be paid at 3 per cent. per month, and that the mortgage money should be repaid on a specified date, and that in case of default in such payment interest would run at the rate of 6 per cent. per month. The mortgagee sued to recover the money by sale of the mortgaged property. The trial Court held that the stipulations as to interest were in the nature of a penalty and decreed the suit, allowing interest at 12 per cent per annum. On appeal the lower appellate Court held that the stipulation to pay higher interest in default alone was in the nature of a penalty, but it found that there had been undue influence and in consideration of this, dismissed the appeal. The plaintiff appealed to the High Court, contending that the decision as to undue influence was wrong as no issue was framed as to this, and maintaining that the stipulation to pay interest at 6 per cent per month was not in the nature of a penalty.

Held: (1) that, in order to establish undue influence, it must appear that there was something unconscionable either in the original dealing or in the subsequent stages of the transaction, and as nothing unconscionable had been made to appear in this case and there was no plea as to undue influence, the stipulated rate of interest could not be disallowed on the ground of undue influence; (2) that the stipulation to pay interest at the rate of 6 per cent per month on default was in the nature of a penalty. [P 567 C 1]

Shoroshi Charan Mitter and S. K. Mitter—for Appellants.

Gurusaran Prosad—for Respondent.

Coutts, J.—This is an appeal against the decision of the Judicial Commissioner of Chota Nagpur in an appeal arising out of a suit on a registered mortgage bond. The bond, which is dated 21st June 1909, was for Rs. 300 and in the bond it was stipulated that interest should be paid at

3 per cent per month and that the mortgage money should be repaid in Sraban 1966 Sambat. In default of payment the interest was to run at the rate of 6 per cent per month. The total amount claimed in the suit was Rs. 1,479, which the plaintiffs sought to recover by sale of the mortgaged property. Two issues were raised in the Court of first instance:

(1) Did the defendant receive the entire consideration money mentioned in the bond? (2) Whether the rate of interest stipulated for in the mortgage bond is in the nature of penalty? Can the plaintiffs recover the interest claimed in this suit? On issue 1 it was found in the Court of first instance that the whole amount of the consideration money mentioned in the bond had been received, but on issue 2 it was held that both the interest at 3 per cent per month and the interest at 6 per cent per month on default were in the nature of penalties and the suit was decreed for interest at only Rs. 12 per cent per annum. On appeal by the plaintiffs to the Judicial Commissioner it was held that interest at the rate of 3 per cent per month was not in the nature of penalty, but that the interest at 6 per cent per month was in the nature of penalty. The learned Judicial Commissioner found however that there had been undue influence and in consideration of this he upheld the decision of the Munsif and dismissed the appeal with costs. The plaintiff has again appealed to this Court.

The first point urged before us is that the learned Judicial Commissioner's decision in the matter of undue influence is wrong. No issue was framed in regard to this and the only reference to it in the pleadings is in paras. 2 and 3 of the written statement. In para. 2 defendant states that in order to meet the expenses of a criminal case he was badly in need of money so he negotiated with the plaintiff's father for the loan, and in para. 3 he says that the plaintiff's father, seeing the necessitous condition of this defendant, and putting undue pressure on him, gave him Rs. 240 only and got the bond executed for Rs. 300, i. e., with an increase of Rs. 25 per cent and made him promise to pay a high rate of interest of 3 per cent per month. This is the only reference to undue influence and it cannot be said that by this vague

reference to undue influence it was in fact pleaded by the defendant; that this was not pleaded is also clear from the fact that no issue was raised on the point. The learned Judicial Commissioner therefore should not have allowed the issue to be raised. In any case there is no ground for the finding that there was undue influence. The learned Judicial Commissioner has presumed that, because the security was good and that the interest was high, there was undue influence and he has relied on the case of *Abdul Majid v. Ksheroode Chandra Pal* (1). The facts of that case however were entirely different from the facts of the present case and it was on these facts that that case was decided. In *Lala Balla Mal v. Ahad Shah* (2) their Lordships of the Privy Council quoted with approval the law as stated by the District Judge that in order to come to the conclusion that there has been undue influence it must appear that there was something unconscionable either in the original dealings or in the subsequent stages of the transaction. It does not appear that in this case there was anything unconscionable at either of these stages and the learned Judicial Commissioner has wrongly applied *Abdul Majid v. Ksheroode Chandra Pal* (1) to this case. There is then no reason for supposing that undue influence has been exercised.

The only other point for consideration is whether interest at 6 per cent per month is in the nature of penalty. On the face of it, it is in the nature of penalty and both the lower Courts have come to the conclusion that it is in fact in the nature of penalty. No reason has been shown to us why we should disagree with this view which has been adopted by both the lower Courts, and I am of opinion that their decision on this point is correct. I would accordingly modify the decree of the learned Judicial Commissioner and would decree this suit with interest at 3 per cent per month from the date of the bond until repayment with proportionate costs.

Das, J.—I agree.

V.S./R.K.

Decree modified.

(1) [1915] 42 Cal. 690=29 I. C. 843.

(2) A. I. R. 1918 P. C. 249=48 I. C. 1=124 P. R. 1918 (P. C.).

*** A. I. R. 1919 Patna 567**

ROE AND COUTTS, JJ.

Sheo Narain Singh — Petitioner.

v.

Ram Pertap Rai—Opposite Party.

Criminal Revn. No. 66 of 1919 Decided on 24th March 1919.

(a) Criminal P. C. (5 of 1898), S. 437—**Person not tried is not accused person.**

A party who is not being tried for an offence is not an accused persons; 32 Cal. 1085, *Foll.*

[P 569 C 2]

(b) Criminal P. C. (1898), Ss. 203, 204 (3) and 437—**In setting aside order of dismissal notice is not necessary.**

In revising under S. 437 an order of dismissal under S. 203 or 204 (3) of the Code it is not necessary to issue notice to the other side; 15 Cal. 608 (*F. B.*), *Foll.*

[P 569 C 1]

(c) Criminal P. C. (1898), Ss. 203, 204 (3) and 437—**In revision further judicial inquiry ordered — Summons to accused cannot be issued before inquiry is completed and prima facie case is made out.**

Where a case is dismissed under S. 203 and the Magistrate is directed under S. 437 of the Code to hold a further judicial inquiry, he has no jurisdiction to issue summons to the accused, until he has completed the judicial inquiry and a prima facie case is disclosed against the accused.

P. C. Manuk and *Nirsu Narayan Sinha*—for Petitioner.

M. Yunus and *S. P. Varma*—for Opposite Party.

The case was originally heard by *Jwala Prasad, J.*, sitting singly who in view of the importance of the matter involved in this case referred it to the Bench.

Jwala Prasad, J. — (21st March 1919).—This is an application against an order of the Sessions Judge of Shahabad, dated 10th February 1919, under S. 437, Criminal P. C., directing further inquiry into a complaint which was dismissed by the Subdivisional Officer of Buxar under S. 203, Criminal P. C. The complaint was lodged in respect of offences under Ss. 395, 379, and 147, I. P. C., on 10th January 1919 and the complainant was examined on oath the same day. The Magistrate, without giving any reason for postponing the issue of processes, passed the following order on the back of the petition:

"Inspector Dumraon to treat this as a first information and make careful inquiry reporting by 18th January 1919."

On 17th January the Inspector submitted his report for judicial inquiry for an offence under S. 323, I. P. C. On receipt of this report the Magistrate on 18th January 1919 dismissed the complaint under S. 203, Criminal P. C. The order of the Magistrate dismissing the com-

plaint has however been set aside by the learned Sessions Judge of Shahabad and further inquiry into the complaint under S. 427 of the Code has been directed. Mr. Manuk on behalf of the petitioners attacks the order of the Sessions Judge on various grounds, the principal one being that no notice was given to the petitioners by the Sessions Judge before directing further inquiry under S. 437, Criminal P. C. It is not necessary for me to mention, or deal with the other grounds taken by Mr. Manuk on behalf of the petitioners, inasmuch as I consider it desirable that the principal question whether the order of the Sessions Judge under S. 437 should be set aside as being bad for want of notice to the petitioners, should be decided by a larger Bench. S. 437 itself does not provide for any notice being given to any person affected by an order under that section. Mr. Manuk however invokes the aid of the general principle of law that no order should be passed against any person without notice to him and without giving him an opportunity of being heard against the proposed order.

In support of this contention a number of authorities of the various High Courts, notably of the Calcutta High Court, has been cited to me. It is needless to refer to all of them, as they have been enumerated in almost all the annotated editions of the Criminal P. C. The leading decision is that of the Full Bench of the Calcutta High Court in the matter of *Hari Dass Sanyal v. Saritulla* (1). That was a case where the accused person was discharged under S. 253 of the Code. It is however observed in the judgment of the learned Chief Justice and Prinsep, J., that no notice would be necessary in case of a complaint dismissed under S. 203 where the accused person had not appeared or was not summoned to appear before the Magistrate—a distinction is made between a discharge of an accused under S. 253 and a dismissal of a complaint under S. 203. Mr. Yunus appearing for the opposite party relies upon this distinction and contends that no notice at all was necessary, inasmuch as the learned Sessions Judge in directing further inquiry under S. 437 was making the same order as the Magistrate would have made upon the complaint, namely, directing processes to issue against the accused behind their backs and

without a notice to them. Mr. Yunus further relies upon the case of *Girish Chunder Ghose v. Emperor* (2) and the view taken by the Allahabad High Court in several cases, particularly in *Angan v. Ram Pirbhan* (3) and *Liaquat Husain v. Emperor* (4). A contrary view appears to have been taken in 1906 by the Calcutta High Court in the case of *Brij Kishore Ghose v. Gopal Rai* (5) and *Bhagwat Prasad Singh v. Bishuni Darzi* (6). In the latter case the report of the case is too short to give us a detailed account of the facts of that case but the following observation appears in the body of the judgment:

"It is a rule which has been consistently followed in this Court that notice should be served unless the case is a very clear one."

Mr. Manuk relies upon this observation for his contention that in the case of dismissal of a complaint under S. 203 also the practice of the Calcutta High Court had been to require a notice to be given to the accused before directing further inquiry into the complaint under S. 437 of the Code.

In view however of a different opinion expressed by the Calcutta High Court in the Full Bench case of *Hari Dass Sanyal v. Saritulla* (1) and the positive decision in the case of *Girish Chunder Ghose v. Emperor* (2) it is impossible to say that the invariable rule of practice of that Court was to require a notice to be given before directing further inquiry under S. 437. My attention has been drawn to a judgment of Imam, J., sitting singly, in an unreported case of *Hari Lal Choudhry v. Emperor* (7). In that case on a complaint some of the accused persons mentioned in the petition were tried and convicted. The Magistrate refused to issue summons against the remaining persons accused in the complaint petition. On motion to the Sessions Judge the order of the Magistrate was set aside and further inquiry was directed under S. 437 of the Code. This order was passed without any notice to the persons affected by the order. Imam, J., adopted the view of the Calcutta High Court in *Girish Chunder Ghose v. Emperor* (2) and the principle enunciated in the judgment of

(2) [1902] 29 Cal. 457.

(3) [1913] 35 All. 78=18 I. C. 146.

(4) [1918] 40 All. 138=43 I. C. 622.

(5) [1907] 11 C. W. N. 316.

(6) [1907] 11 C. W. N. 35 (notes).

(7) A. I. R. 1919 Pat. 361=53 I. C. 931.

(1) [1888] 15 Cal. 608 (F. B.).

Prinsep, J., in *Hari Dass Sanyal v. Saritulla* (1), and held that where the accused persons had not entered appearance in the Court of the Magistrate no notice was necessary.

I have already said that S. 437, itself does not expressly provide for a notice to be given to the person affected by the order under that section. The decision of this case therefore involves laying down an important rule of procedure to be followed by the lower Courts in this Province in dealing under S. 437 of the Code, with complaints dismissed under S. 203. In view of the fact that cases of this kind very frequently occur, I feel it desirable that the question be set at rest by a definite and authoritative decision on the point of a larger Bench of this High Court. Let the case be placed before a proper Bench for decision as early as possible.

Judgment.—The petitioners in this case are aggrieved, firstly, by an order of the Sessions Judge directing a further judicial inquiry, upon which the District Magistrate directed a specified Deputy Magistrate to hold that judicial inquiry; and secondly, by the further proceedings in which the Deputy Magistrate ignored both the orders of the Sessions Judge and the District Magistrate and summoned the accused to answer charges which everybody who had looked into the matter at all had declared either to be largely exaggerated or wholly false as regards a number of the accused who have been summoned.

Two grounds are taken, firstly, that the order passed by the Sessions Judge was without notice to the accused; and, secondly, that the Deputy Magistrate had no jurisdiction to issue summonses until a judicial inquiry had been made. The whole case law with regard to notice has been clearly and fully stated by our brother Jwala Prasad. It is sufficient for us to say that the view taken by the Full Bench in Calcutta in the case of *Hari Dass Sanyal v. Saritulla* (1) was that in the case of a dismissal under S. 203 or S. 204 (3) notice to the other side is not desirable. The other side has never yet had notice, the proceedings not having reached the stage of summoning them as accused persons and in this regard such cases are distinguishable from cases in which accused persons have been tried and discharged. Action in contra-

vention of that Full Bench decision should not, we respectfully think, have been taken without further reference to a Full Bench. We see no reason to refer this matter to a Full Bench of this Court, for the reason that we accept the argument suggested by the Full Bench of the Calcutta High Court. It seems to us illogical that an accused should not be allowed to appear in proceedings under S. 202 (and this is the settled practice of this Court frequently and forcefully laid down), but that he should be allowed to appear in proceedings purporting to revise proceedings under S. 202 and that if under that section the proceedings are continued he should again be precluded from appearing. It seems to us far better that until the accused has been brought before the Court either by summons or by warrant, he should not be allowed to come before the Court at all. The view taken in *Sat Narain Tewari v. Emperor* (8), that a party who is not being tried for an offence is not an accused person, is clearly the correct view. As regards the merits of the learned Sessions Judge's original order we feel that it, as framed by him and interpreted by the District Magistrate, was a sound order.

The police had desired a further investigation and the complainant had prayed for a further investigation. We can see no objection to the form of the orders made by the heads of the district. We regard the proceedings of the Deputy Magistrate, Mr. Kaviraj, as a defiance of the orders of his official superiors. He should not have issued these summonses until he had made a judicial inquiry, and we are of opinion that in the circumstances of the case the issue of the summonses against all the accused was outside his powers. We therefore cancel the order instituting proceedings against the accused named by Mr. Kaviraj and direct that no summons or warrant be issued until a judicial inquiry has been made and a prima facie case disclosed against them.

V.S./R.K.

Order cancelled.

(8) [1905] 32 Cal. 1085.

A. I. R. 1919 Patna 570

ATKINSON, J.

Ram Khelawan Thakur—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 185 of 1919, Decided on 2nd July 1919, against order of Sess. Judge., Muzaffarpur, D/- 28th May 1919.

Penal Code (1860), Ss. 403 and 406—Agent recovering money on behalf of principal—Agent subsequently refusing to refund money at request of person paying it is not criminally liable and cannot be prosecuted for criminal breach of trust.

Where an agent receives money on behalf of his principal the money so received is the property of, and is owned by the principal and if such agent refuses at the request of the person paying the money to refund it, he is not criminally liable, and consequently, cannot be prosecuted for the offence of criminal breach of trust, as the gist of that offence is the dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him : 24 I. C. 332, *Rel. on.* [P 571 C 2]

P. C. Manuk and Hasan Jan—for Petitioner.

Judgment. — The petitioner, Ram Khelawan Thakur, seeks by this application to have his conviction set aside as originally pronounced by the Subdivisional Officer, Mr. Owen, pursuant to his order dated 5th May 1919, which was affirmed on appeal by the learned Sessions Judge of Muzaffarpur on 28th May 1919. The accused was charged under S. 406, I. P. C., with the offence of criminal breach of trust. The trial Court found the accused guilty and on appeal the Sessions Judge affirmed the conviction of the accused, and he awarded him four months' rigorous imprisonment coupled with payment of a fine of Rs. 120.

Mr. Manuk, who appears on behalf of the petitioner contends that upon the evidence adduced by the prosecution the charge of criminal breach of trust cannot be in law sustained. It would appear that one Bhageloo brought a criminal charge against four persons by the name of Misser for an alleged offence under S. 325, I. P. C. While the proceedings were pending against these four persons at the instance of Bhageloo a panchayat was called, and the panchayat agreed to get the assent of Bhageloo to a compromise upon the condition that accused should pay to Bhageloo the sum of Rs. 56 as

compensation in respect of the injuries which he had sustained arising out of the assault which had been committed upon him by such accused persons. Bhageloo at the time that the compromise was arrived at by the panch was in Sitamarhi Hospital, but it was taken for granted by all the members of the panchayat that Bhageloo would accept whatever terms the panchayat agreed upon. Accordingly on the following day the parties came to Sitamarhi and brought with them the money with a view of getting Bhageloo's assent to the terms of the compromise arrived at by the panch. The accused in the proceedings under S. 325 accompanied by a person called Raghu Nath Misser also went to Sitamarhi, interviewed Bhageloo and Bhageloo verbally assented to the terms of the compromise which had been proposed and agreed to by the other parties at the instance of the panch, and it was suggested at the time that it would be desirable that there should be a petition in writing stating the terms of the compromise and that such petition should be signed by Bhageloo. It is stated by various witnesses on behalf of the prosecution that Bhageloo requested Raghu Nath Misser, who was to pay the money by way of compensation for the injuries which Bhageloo sustained, that the same should be paid to the petitioner as agent on behalf of Bhageloo who was then in bed in hospital.

After Bhageloo had been interviewed, and while the petition of compromise was being prepared in a written form, Raghu Nath paid to the petitioner Rs. 50, being the amount of compensation assessed by the panch to be paid to Bhageloo. When the compromise was embodied in the form of a petition and taken to Bhageloo for signature, Bhageloo refused to sign it, although his agent Ram Khelawan Thakur, the petitioner, had at the time already received Rs. 50 which at the request of Bhageloo had been paid and entrusted to him. It is upon these facts that the petitioner has been prosecuted for criminal breach of trust. The criminal breach of trust relied upon is that the petitioner failed and omitted to return to Raghu Nath Misser the money which he had paid and entrusted to the petitioner as agent on behalf of Bhageloo, his principal. There is no suggestion of any breach of trust

between the petitioner and Bhageloo, his principal.

The Crown case is based upon an alleged entrustment or entrusting of the sum of Rs. 50 by Raghu Nath Misser to the petitioner. I fail to see myself on the evidence which I have read very carefully, anything to suggest any entrustment by Raghu Nath Misser to the petitioner as trustee or in trust for Raghu Nath Misser. There was no doubt the giving of a sum of money by Raghu Nath Misser to the petitioner as agent for a disclosed principal, which constituted no more than a payment of a debt alleged to be due to the principal. It was clearly intended by the terms of the compromise that Raghu Nath Misser should pay the sum of Rs. 50 to the petitioner and that the petitioner was to receive the same on behalf of his known principal, and that upon receipt by the petitioner of the money so received the same became the property in law of Bhageloo who was the owner thereof. But there was no express entrustment to the petitioner of any moneys in trust for Raghu Nath Misser or any of the accused persons charged under S. 325 proceedings at the instance of Bhageloo. When the compromise failed or fell through by reason of the fact that Bhageloo declined to sign the written petition of compromise, it may be that according to civil law a constructive trust would be created or arise by implication of law, whereby the petitioner might be deemed to hold the money he received in trust for the person who paid it to him upon a failure of consideration to support the original contract. By civil law I apprehend under such circumstances that the form of action which could be instituted would be for money had and received to the use of and on behalf of the person from whom the money was received. Therefore though one might contend that the law created a constructive trust as against the petitioner at the suit of Raghu Nath Misser in respect of which he might be made answerable civilly in an ordinary civil suit yet the petitioner is not amenable for any offence against the criminal law.

The question which I have to consider is whether upon the evidence there has been an offence committed within the meaning of S. 406 read with S. 403, I. P. C. S. 406 is general in form and

simply avers that "whoever commits a criminal breach of trust shall be punished with imprisonment." The important section however is S. 403, which defines criminal misappropriation of property. S. 403 says:

"Whoever dishonestly misappropriates or converts to his own use any moveable property shall be punished with imprisonment"

Therefore the gist of the criminal offence of breach of trust is dishonest misappropriation or the conversion by one to his own use of the property of another which has been entrusted to him. Now I have perused the evidence in this case, and I fail to detect, so far as the prosecution case is concerned, any evidence from which the inference could be fairly or legitimately drawn that the petitioner here dishonestly misappropriated the sum of Rs. 50 which he received or that he converted the same to his own use. The evidence of P. W. 2 and of P. W. 5 leaves me under no doubt as to what happened. It may be desirable to refer to one or two Paragraphs of their evidence. P. W. 2 says:

"After I had fair copied the petition Kandu Babu said that Bhageloo's thumb impression should be taken on it. Bhageloo was in hospital. Accused was looking after the case for him. So we went to hospital;"

and a little further on he says:

"Raghu Nath asked the accused to give back the money. The accused said he would not give it back. We went off next towards the bazar, and we went to Kandu Babu."

Now P. W. 2 also says in cross-examination that

"Bhageloo had said that the money should be paid to Ram Khelawan and upon that basis, he, Raghu Nath, had given the money to the petitioner."

P. W. 5 deposes to the fact that he was present at the panchayat; the terms were settled at the panchayat; and the following day Raghu Nath and others came to Sitamarhi. Then he states:

"They met the accused in the kachhari. The compromise petition was written after Rs. 50 had been paid to this accused by Raghu Nath in his presence. He, Raghu Nath, and the accused and two muharrirs went to the hospital;" after the parties went into the hospital apparently this witness came out and remained outside. When the others came out of the hospital it was ascertained

"that Bhageloo refused to put his thumb impression. Raghu Nath asked accused to pay back the Rs. 50. But the accused did not do so, and went off."

Further on this witness says:

"The money was paid to Ram Khelawan because he was acting on behalf of Bhageloo." "We gave the money to Ram Khelawan as we had asked Bhageloo, and he had said that the money should be paid to Ram Khelawan, and we did not suspect any dishonesty."

Therefore the moment that the petitioner received Rs. 50 he received it on behalf of Bhageloo, and he must, as principal, be answerable for the acts of his agent acting within the scope of his authority. Mr. Manuk very fairly suggests that it would not be possible in this case to sustain a prosecution as against Bhageloo for criminal breach of trust. Clearly it would not. There may be in law an implied trust as between the petitioner and Raghu Nath that will be sufficient to enable Raghu Nath to maintain a civil suit against the petitioner to recover the money he claims. Such an obligation or trust would not, in my opinion, create an offence punishable by the criminal law as a criminal breach of trust, or amount to criminal misappropriation or conversion of the property of another. In the absence of clear and precise proof of the offence charged the accused ought not to be convicted. It appears to me, the reasoning of the decision reported as *Nga Po Ywet v. Emperor* (1) applies in principle to the facts of this case. In my opinion the learned Judge in appeal has failed to bear in mind the proper legal consideration which should have been present in weighing and considering the evidence. I do not think on the evidence adduced by the prosecution that it can be fairly said that the petitioner was guilty of criminal misappropriation or of criminal conversion of the money he received to his own use. Mr. Manuk admits that although the petitioner may be liable civilly he is not liable criminally. In my view he is not liable criminally, but he properly would be liable civilly.

Thus to avoid any future and unnecessary litigation between the parties, Mr. Manuk confesses that his client is willing to pay to Raghu Nath Misser within ten days from this date the sum of Rs. 50, which he admits having received from him under the circumstances aforesaid. Accordingly I set aside the conviction of the accused pronounced by the learned Sub-divisional Officer, dated 5th May 1919, and also the con-

viction in appeal affirmed by Mr. Boyce, dated 28th May 1919. The fine, if paid by the accused, shall be refunded,
V.S./R.K. *Conviction set aside.*

*** A. I. R. 1919 Patna 572**

DAWSON-MILLER, C. J. AND COUTTS, J.

Ram Dai—Applicant.

v.
Ram Chandrabali Debi — Opposite Party.

Privy Council Appeal No. 99 of 1918,
Decided on 7th May 1919.

*** Registration Act (1908), S. 28—Portion of property in document in district of Sub-Registrar—Transferor acting bona fide—Transferor has ceased to have interest in property—Registration is valid—Registration is invalid when parties by fraud or collusion include property which does not exist for purpose of giving jurisdiction.**

If any portion of the property to which a document relates is within the district of the Sub-Registrar of the office where it is registered, the registration is a valid registration within S. 28, Registration Act, even if it turns out that the transferor, though acting in a perfectly bona fide manner, has ceased to have an interest in that property, provided the property described exists. It is only where there is fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register a document by including property which does not exist, that registration is rendered invalid.

[P 572 C 2 P 573 O 1]

P. K. Sen and Tribhuvan Nath Sahay
—for Applicant.

Banwari Lal—for Opposite Party.

Judgment.—In our opinion this application should be rejected. The petitioner contended before this Court when the matter came here on appeal that a deed of sale relied upon by the other side was not valid on the ground that it had not been properly registered. A portion of the property to which the document related was undoubtedly situate at Benares, the bulk of the property was situate elsewhere and the deed was registered at Benares. The section specifying the particular registration office in which a document must be registered is S. 28, Registration Act, and that section provides that the document shall be presented for registration in the office of a Sub-Registrar within whose subdistrict the whole or some portion of the property to which such document relates is situate. Therefore (prima facie) if any portion of the property to which the document relates is within the district of the Sub-Registrar of the office where it is registered,

(1) A. I. R. 1914 L. B. 1=24 I. C. 332=15
Cr. L. J. 452=7 L. B. R. 278 (F. B.).

there is a valid registration within that section. It turned out in fact that the only property mentioned in the document and situate within the district of the registration office where the document was registered was property over which the transferor had no title, and it was contended before this Court that in such circumstances the registration must be deemed to be invalid. This contention was rejected.

It has been held in the Courts in this country that a mere flaw in the vendor's title in the only part of the property situate within the district of the registration office is not sufficient to invalidate the registration if it is made in good faith: see *Broja Gopal Mukerjee v. Abinash Chandra Biswas* (1). There is a later decision of their Lordships of the Privy Council in *Harendra Lal Roy Chowdhuri v. Srimati Hari Dasi Debi* (2) which is relied on by the petitioner. There the deed was registered in Calcutta. The only property in Calcutta to which it related did not exist at all, and it was found as a fact that the inclusion of this property was merely done with the intention to give jurisdiction to the Sub-Registrar in Calcutta, the parties knowing full well that they had no interest in the property therein mentioned. Where there is any fraud or collusion between the parties for the purpose of giving jurisdiction to a particular Sub-Registrar to register the document by including property which does not exist this is sufficient to invalidate the registration, but it seems to us well established that registration is not invalid if the property described exists, merely because the transferor, though acting in a perfectly bona fide manner, turns out to have ceased to have an interest in that property. This Court found that there was no fraud on the part of the transferor or collusion between the parties in order to deceive the Registrar and obtain registration. The transaction must therefore be regarded as done in good faith. The petitioner has been unable to adduce any authority in his favour, and it seems to us quite clear that as long as the case complies with S. 28, that is to say, as long as the document does refer to some property situate within the district

where registration takes place, that is sufficient to bring it within the section, and the cases clearly lay down that, unless there is some fraud or collusion, the registration is in itself perfectly valid, whether in fact the person registering eventually proves his title to the property or not. In these circumstances and as there is no authority to support the contention of the petitioner, we do not think that there is sufficient substance in this point of law to entitle him to take the opinion of their Lordships of the Privy Council. This application is dismissed with costs.

V.S./R.K. *Application dismissed.*

A. I. R. 1919 Patna 573

DAWSON-MILLER, C. J. AND
MULLICK, J.

Nilmani Nath Sahi Deo—Objector—Appellant.

v.

Pratap Usai Nath Sahi Deo—Decreeholder—Respondent.

Second Appeal No. 213 of 1918, Decided on 6th December 1918, against order of Deputy Commissioner, Ranchi, D/- 2nd August 1918.

(a) *Chota Nagpur Tenancy Act* (1908), Ss. 213 and 215—Rent decree—Tenure sold in execution—Application to set aside sale—Deputy Collector refusing to summon witnesses—High Court can interfere—Civil P. C. (1908), S. 115—Government of India Act (1915), S. 107.

Petitioner applied under S. 213 to set aside the sale of a tenure which had been sold in execution of a rent decree. His case was that as the judgment-debtor's cosharer he was entitled to have the sale set aside on the ground of material irregularity and inadequacy of price to the extent of his own share in the tenure. The Deputy Collector declined to summon petitioner's witnesses on the ground that he was not satisfied that they were necessary:

Held: that the High Court had power to interfere with the order of the Deputy Collector either under S. 115, Civil P. C., or under S. 107, Government of India Act, inasmuch as there had been something in the nature of a denial of the right of fair trial. [P 574 C 1]

(b) *Chota Nagpur Tenancy Act* (1908), S. 215—Scope of. (*Semble*).

Per *Mullick, J.*—S. 215 is wide enough to make an appeal competent in a case where the Deputy Collector refuses to summon witnesses in an application to set aside sale of a tenure in execution of a rent decree. [P 574 C 1]

Atul Krishna Roy—for Appellant.

P. R. Dass, S. K. Sahai, S. N. Palit, S. K. Bhattacharya and B. C. De—for Respondent.

Mullick, J.—The Maharaja of Chota Nagpur has obtained a decree for rent

(1) [1910] 5 I. C. 127.

(2) A. I. R. 1914 P. C. 67=41 I. A. 110=41 Cal. 972=23 I. C. 637(P. C.).

in respect of a tenure known as the Kairo Estate comprising 84 villages, and has under the Chota Nagpur Tenancy Act caused the tenure to be sold at auction. The tenant against whom the decree has been obtained is Thakur Madan Mohan Nath Sahi Deo, and the auction-purchasers are Rai Bahadur Baldeo Das, Jugal Kishore Das, Rameswar Das, Ghanashyam Das and Brij Mohan Das. The applicant before us is Lal Nilmani Nath Sahi Deo. He applies under S. 213, Chota Nagpur Tenancy Act, to set aside the sale. His case is that he has obtained by private partition an interest in 12 villages in the tenure and that he is, as the judgment-debtor's cosharer to that extent, entitled to have the sale set aside on the ground of material irregularity and inadequacy of price. Before the Deputy Collector, who exercising the powers of the Deputy Commissioner, was conducting the execution proceedings, he applied for summonses on a number of witnesses who, he alleged, would establish the grounds upon which he claimed relief. By an order, dated 2nd August 1918, the Deputy Collector declined to issue summonses on the applicant's witnesses on the ground that he was not satisfied that they were necessary.

It is against this order that the present appeal has been preferred. The application is opposed by Mr. Das on behalf of the auction-purchasers and by Babu Sakti Kanta Bhattacharji on behalf of the decree-holder. It is contended that no appeal lies under the provisions of S. 215, Chota Nagpur Tenancy Act, firstly, because the order of the Deputy Collector is not one relating to execution and, secondly, because it is of an interlocutory nature. Mr. Das strongly contends that execution ends with the sale and that an application to set aside a sale is not one relating to execution. An elaborate argument has been addressed to us on the point whether an appeal lies but, in my opinion, it is unnecessary to come to a decision on it, though, as a matter of first impression, it would seem that S. 215 is wide enough to make an appeal competent. If an appeal does not lie, we think we have power to interfere either under S. 115, Civil P. C., or under S. 107, Government of India Act, 1915, and we think we ought to interfere because clearly there has been something in the nature of a denial of the right of fair trial.

The learned Deputy Collector gives no reason for refusing to summon the applicant's witnesses. He merely says he is not satisfied that they are necessary. Now the applicant asserts that the witnesses are necessary to prove, firstly, that the sale notices were not served according to law and, secondly, that the tenure has been sold for an inadequate price. We are not satisfied that the application has been made for the purpose of vexation or delay and that it constitutes an abuse of the process of the Court. If the evidence sought to be adduced is irrelevant, the Court has ample power to exclude it, but the Court, upon the facts placed before it, was, in our opinion, not justified in refusing to grant process.

We accordingly set aside the Deputy Collector's order and direct that he do issue summonses on the witnesses named by the applicant and dispose of the objection according to law. The application is therefore allowed with costs, which will be assessed on the basis that this is an application for revision. The hearing fee is assessed at three gold mohurs.

Dawson-Miller, C. J.—I agree and merely wish to add that I express no opinion as to whether an appeal lies in this case.

V.S./R.K.

Application allowed.

A. I. R. 1919 Patna 574

DAWSON-MILLER, C. J. AND ADAMI, J.

Baldeo Singh and others—Defendants—Appellants.

v.

Meghu Singh and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 51 of 1918, Decided on 19th June 1919, against judgment of Mullick, J., in Second Appeal No. 722 of 1917, D/- 22nd March 1918.

(a) Civil P. C. (5 of 1908), S. 64 and O. 21, R. 97—Sale of equity of redemption in case of mortgage with possession — Symbolical possession is not necessary to complete title.

Where the equity of redemption in respect of property which is in the possession of mortgagees is purchased at an auction sale, it is not necessary that symbolical possession of the intangible right purchased should be given to the auction-purchaser in order to complete his title, if in fact he does exercise rights of ownership over the property which he has purchased. [P 577 C 2]

(b) Mortgage—Redemption—Suit for—Execution sale alleged to be fraudulent and illegal

—Sale not alleged to be nullity and suit before it is set aside held not competent.

Plaintiff sued to redeem a mortgage and alleged in the plaint that a certain sale of the equity of redemption in execution of a decree was fraudulent, collusive and illegal:

Held: (1) that the allegation with regard to the auction sale did not amount to an allegation that the sale was a nullity but that the sale was such as might upon proper proceedings being taken possibly be set aside;

(2) that no proceedings having been taken to set aside the auction sale the suit for redemption was not competent. [P 577 C 2]

(c) Civil P. C. (5 of 1908), O. 21, R. 22—**Notice is necessary only after one year from decree.**

The notice mentioned in O. 21, R. 22, is only required to be issued where the application for execution is more than one year after the date of the decree. [P 577 C 1]

K. Hasnain and A. K. Roy—for Appellants.

Bunwari Lal and G. D. Singh—for Respondents.

Dawson-Miller, C. J.—This is an appeal under Cl. 10, Letters Patent, from a judgment of a single Judge of this Court, dated 22nd March 1918, dismissing an appeal from the Subordinate Judge by whose decision the plaintiff's suit which had been dismissed by the Munsif was remanded to the Munsif for a fresh trial. The facts of the case, so far as they are material to the present appeal, are these: In February 1886 the plaintiffs' ancestors mortgaged 12 bighas of land over which they had occupancy rights to the ancestors of the defendants under a usufructuary mortgage and put the defendant's predecessors in possession, and out of the proceeds of the land they were to satisfy themselves under the terms of the mortgage in lieu of receiving interest on the money advanced. In the same year, about six months later, in August, a fractional proprietor of the property by name Kailas Chandra, who had in the previous year obtained a rent decree against the mortgagors, took out execution proceedings and the property, the subject of the mortgage, as well as other property belonging to the mortgagors, were sold in execution of that decree. The sale took place on 7th June 1886, the property having been attached in the previous March and the sale was confirmed on 27th August 1886.

The suit by the proprietor being one by a fractional proprietor only entitled him to a money decree and not a rent decree under the Bengal Tenancy Act. Therefore what he purchased at the sale

was merely the mortgagors' equity of redemption subject to encumbrances, that is to say he purchased the right, title and interest which the mortgagors had and the interest so transferred to him was subject to the mortgage of the defendants which was still subsisting; but it seems to me that from that moment the plaintiffs lost all rights, title and interest they had in the property and that that interest was transferred to Kailas Chandra. No steps were taken by the mortgagors to set aside that sale, and in the year 1892 Kailas Chandra sold the equity of redemption which he had purchased at the auction sale in execution of his decree to the mortgagees themselves and therefore the situation was that the mortgagees' interest as such merged in their greater interest as proprietors of the occupancy right. So matters went on, and in the year 1910 there were survey operations in which a portion of the land was recorded as in the possession of the plaintiffs and another portion was recorded as in the possession of the defendants.

Then in the year 1915, the plaintiffs who represented the original mortgagors brought this suit claiming to redeem the property and they tendered to the defendants the sum of Rs. 240 which was the amount of the loan and, on the defendants refusing to accept it, paid the money into Court and claimed to be entitled to redeem the property and get possession. In their plaint the plaintiffs allege that the purchase at auction in the year 1886 made by Babu Kailas Chandra and the subsequent sale by him of the equity of redemption to the mortgagees, who are now represented by the defendants, was fraudulent, collusive and illegal, and they say that no process of execution of the decree was served nor was delivery of possession at all made in the locality or at the house or on the person of the plaintiffs, and that neither Kailas Chandra nor the defendants ever came into possession of the said land in the capacity of purchaser at auction sale or purchaser under the the sale deed and that the defendants have all along been in possession in the capacity of mortgagees, that the entire proceeds of the execution of the decree, sale and delivery of possession have been surreptitiously and fraudulently taken and that the purchase at sale and under the sale deed,

which are quite fraudulent and illegal, cannot be a bar to the plaintiffs' redemption.

When the matter came before the Munsif he pointed out very properly that, on the plaint as it stood, it was not contended that the purchaser at auction by Kailas Chandra was a nullity, and he pointed out that, if the sale was a valid and subsisting sale until it had been set aside, and could not be treated as a nullity which in fact the plaintiffs did not claim to do, it was a bar to any claim to redemption until it was set aside by a Court of competent jurisdiction. It was not very clear from the plaint whether the sale to Kailas Babu included all the lands in suit and therefore the learned Munsif ascertained for himself from the record whether this was so or not and found that in fact the purchase by Kailas Chandra did include all the lands in suit as well as some others. The result was, according to the Munsif, that Kailas Babu purchased the equity of redemption, which was all that was left to the plaintiffs at that time, and that this he sold to the defendants who were at that time the mortgagees or rehandars under the usufructuary mortgage deed of the plaintiffs. It appeared to him therefore that it was unnecessary in this case to go into any evidence at all because no suit had been brought to set aside the sale and, as it was not claimed that the sale was void and could be left out of consideration altogether, the plaintiffs were clearly not entitled to redeem.

On appeal to the Subordinate Judge, he remanded the suit back to the Munsif for a fresh trial by allowing the parties to adduce evidence in support of their respective cases and the ground upon which he did that was that the lower Court did not allow the plaintiffs to prove that the decree obtained by Kailas Chandra was fraudulent and invalid or that the defendants were mortgagees in possession. Now, it is obvious from this that the Subordinate Judge made a mistake in supposing that the plaintiffs had ever questioned the validity of the decree under which the execution sale took place in 1886. If it had been contended that the decree itself was a nullity then, no doubt, that would have been a matter for evidence. But no such allegation was made in the plaint at all. The only

contention in the plaint was that the auction purchase by Kailas Chandra was fraudulent and collusive and illegal and not that it was a sale under a decree which in itself was not operative nor was it indeed alleged in the plaint that the sale itself was void. All that was alleged was that the sale was fraudulent and collusive and therefore such as might upon proper proceedings being taken possibly be set aside. But as no proceedings had been taken to set it aside and as the period for taking such proceedings, which in the case of fraud would be three years, had passed from the time when the sale took place or when the plaintiffs knew of the fraud it was clear that there was nothing more that could be done to assist the plaintiffs to get rid of the sale.

An appeal was brought from the decision of the Subordinate Judge to a Judge of this Court and he also seems to have been under the impression, no doubt misled by the judgment of the Subordinate Judge, that what was in question in the case was the validity not of the sale but of the decree under which Kailas Babu's auction-purchase took place. The main attack upon the validity of the purchase was that there had been no service of notice to the judgment-debtors under O. 21, R. 22, Civil P. C., and that in the absence of any such notice to the defendants the executing Court had no authority to sell the property and was acting without jurisdiction so that the sale was a nullity. I have already said that it was not specifically raised in the pleadings that the sale was a nullity but the question appears to have been treated in the lower Courts as if such a plea had been put forward. When the learned Judge of this Court came to deal with the case he said:

"If the decree (I call attention to the word decree) of 1886 obtained by Kailas Babu was obtained without issue of summons in the suit and if the sale was held without issue of notice then there was no representation at all of the parties interested and the Court's jurisdiction to proceed with the trial was ousted,"

and he says that evidence must be taken in order to ascertain whether the decree was obtained without issue of summons and notice upon the defendants. He concludes:

"If the plaintiffs succeed in proving this then they are entitled to record the decree and the sale as nullities and to proceed to establish their claim to redemption. If they fail then the

question will arise whether the defendants having purchased the equity of redemption, if they did purchase it, are entitled to resist redemption on the principle of *Pancham Lal v. Kishun Pershad* (1)."

He points out that this is a debatable point but one which, so far as this Court is concerned, has been settled by the decision in *Sheo Narain Ojha v. Ram Jatan Ojha* (2). So far as the decision of the learned Judge is concerned, I do not think there could be anything to complain about it if in fact it were based upon a true apprehension and appreciation of the facts of this case. And if, in fact, it were alleged and proved that there had been no issue of summons in the suit upon the parties, then clearly the plaintiffs would be entitled to treat the decree and all subsequent proceedings arising therefrom as a nullity, but that never was the case from start to finish and the only question, so far as the validity of any part of the proceedings is concerned, was the question whether the sale not the decree, was a nullity or merely voidable.

A considerable argument was addressed to this Court on both sides as to whether the omission to issue notice under O. 21, R. 22, Civil P. C., was such a defect as would render the subsequent sale proceedings absolutely null and void or whether it was merely an irregularity which whilst entitling the plaintiffs to have the sale set aside on proper proceedings being brought, did not have the larger effect of rendering the sale absolutely void. That might be a question of some nicety, but it is unnecessary in this case for the Court to decide that point because, under the provisions of O. 21, R. 22, it appears that the Court executing the decree is only required to issue the notice there mentioned in cases where the application for execution is made more than one year after the date of the decree, and from the documentary exhibits put in in this case it appears that the date of the decree in favour of Kailas Chandra was 4th September 1885 and that the application for execution was 20th February 1886 so that no question at all could arise as to whether the sale was void or merely voidable owing to the absence of the notice under O. 21, R. 22, because in the particular

circumstances of this case that rule has no application. It seems to me therefore that the defendants' appeal in this case must succeed and that the decree of the Munsif must be restored because the question about which so much argument has been put before the Court turns out not to be a question which really arises. The result is that the validity of the sale, so far as any fault in procedure is concerned, is unimpeachable and not only is it not void, but it could not even be set aside as voidable upon the grounds which have been alleged by the respondents.

A further point however arose during the argument to this effect: that it is pleaded that Kailas Chandra never in fact got possession of the property which he purchased. Now, what he purchased at the auction sale was the interest of the mortgagors which was the equity of redemption. The mortgagees were still in possession and entitled to remain in possession and could not be turned out either by the mortgagors themselves or by a purchase of the mortgagor's equity of redemption because he purchased subject to all encumbrances. Therefore there was no physical possession which the purchaser could take and it was only symbolical possession that could have been effected in his favour in the particular circumstances of the case. It is not, in my opinion, necessary in a case like the present that symbolical possession of an intangible right should be given to the purchaser in order to complete his title if in fact he does exercise rights of ownership over the property which he has purchased. What happened in the present case was, that having purchased the equity of redemption in the year 1886 he did in fact transfer it by sale to the defendants the mortgagees and therefore he exercised in a most effective way the rights of ownership and rights of possession, so far as he could be said to have possession in the property which he purchased, by that subsequent sale in 1892. It must be taken therefore that as against the plaintiffs, the mortgagors, his rights were complete and final even if transfer of possession were necessary at all events from the year 1892. There is no other point which has been discussed before us in the case. In my opinion the appeal must be allowed with costs here and in all the lower Courts and the decree of

(1) [1910] 6 I. C. 47.

(2) [1917] 2 Pat. L. J. 587=41 I. C. 533.

the learned Munsiff must be restored dismissing the claim.

Adami, J.—I agree.

V.S./R.K.

Appeal allowed.

A. I. R. 1919 Patna 578 (1)

ROE AND COUTTS, JJ.

Thakur Prasad Aurora and another—Appellants.

v.

Manager, Barabhum Encumbered Estate, Purulia, and another—Respondents.

Second Appeal No. 1412 of 1917, Decided on 25th March 1919, from decision of Dist. Judge, Manbhum, D/- 11th May 1917.

(a) Chota Nagpur Encumbered Estates Act (1876), S. 8—Manager's act outside his competency—Suit lies for declaration that what he has done is outside scope of Act.

A suit will not lie for a declaration against the manager of an estate notified under the Chota Nagpur Encumbered Estates Act, if it is found, as a question of law or fact, that his action was done in good faith under the provisions of S. 8 of the Act but if what he purports to have done was not really an act which he was competent to do under S. 8, a suit will lie for a declaration that what he had done was outside the scope of the Act altogether. [P 578 C 1]

(b) Chota Nagpur Encumbered Estates Act (1876), S. 8—Manager can scrutinize debts decreed by competent Court.

In dealing with an estate under S. 8, the manager must take up and scrutinize all debts and finally pass orders, even upon debts decreed by competent Courts. [P 578 C 2]

Naresh Chandra Sinha— for Appellants.

Fakhruddin— for Respondents.

Roe, J.—The appellant in this case sued as plaintiff for a declaration that the manager of an estate notified under the Chota Nagpur Encumbered Estates Act had no jurisdiction to cut down under S. 8 interest already decreed by a competent Court. The learned Judge held that no suit would lie under S. 22 of the Act and he held further that the action of the manager was justified by S. 8 of the Act. With regard to the question whether a suit would lie I am of opinion that from the moment it is found as a question of law or fact that the manager's action was done in good faith under the provisions of S. 8 then no suit would lie for a declaration against him, but if what he purported to do was not really an act which he was competent to do under S. 8 then a suit would lie for a declaration that what he had done was outside the scope of the Act altogether.

On the merits I am satisfied that what was done was done within the scope of the Act. S. 11 clearly contemplates a list of all debts and if it did not include the decreed debts, the Act would be in many cases defeated. R. 14 clearly indicates that the list made under S. 11 should include decreed debts, and under S. 8 that the list contemplated in S. 11 be prepared. Therefore I hold that the manager in dealing with the estate under S. 8 must take up and scrutinize all debts and finally pass orders even upon debts decreed by competent Courts.

I would dismiss this appeal with costs.

Coutts, J.—I agree.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1919 Patna 578 (2)

ATKINSON, J.

Daroga Chowdhury and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 157 of 1919, Decided on 13th June 1919, against order of Sess. Judge, Monghyr, D/- 14th April 1919.

* Criminal P. C. (1898), S. 350—Accused charged with several offences—Magistrate trying case transferred before its completion—Succeeding Magistrate hearing case de novo also transferred before conclusion—Former Magistrate retransferred in his place—Case taken up by Magistrate trying it originally from where he had left before being transferred and accused convicted—Trial held to be illegal—Accused ordered to be tried de novo.

The accused were charged with certain offences under various sections of the Penal Code and the Cattle Trespass Act. The case was assigned to Mr. T, the Joint Magistrate who however was transferred from the district before he was able to complete the case. The subdivisional officer transferred the case to his own file and heard the case de novo disregarding all the evidence recorded by Mr. T. Before the subdivisional officer had concluded the case, Mr. T was retransferred to the district, whereupon the subdivisional officer transferred the case to Mr. T's file with a direction that Mr. T should take it up from where he had left it before being transferred. This was done, and resulted in the accused being convicted:

Held: that the trial was illegal and must be set aside, and the accused tried de novo; that the order of the subdivisional officer was ultra vires and without jurisdiction, because all that had taken place before Mr. T, had been superseded, and formed no part of the record in the proceeding then actually pending and being prosecuted against the accused, and that, as a consequence, Mr. T had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him,

the result being that the accused were gravely prejudiced in their trial. [P 580 C 1]

Gour Chandra Pal—for Petitioners.

Judgment. — The seven petitioners apply that the order of the learned Sessions Judge, dated 14th April 1919 may be set aside, and that consequential upon setting aside of the same that the order of the Joint Magistrate Mr. Tadani, who convicted them on 14th March 1919, should also be set aside. Two points were taken in support of the application on behalf of the petitioners. The petitioners were charged with having committed certain offences under various sections of the Penal Code and the Cattle Trespass Act. The case against the accused was originally assigned to the Joint Magistrate, Mr. Tadani, for hearing and disposal. Mr. Tadani commenced the hearing of the case on 22nd August 1918, and he continued the investigation of the charges against the accused up to 24th October 1918. Mr. Tadani was then about to be transferred from the District of Monghyr; and he applied to the subdivisional officer requesting that the trial of this prosecution might be transferred to the file of some other officer for final disposal. Accordingly, on 24th October 1918 the subdivisional officer, Mr. Majid, transferred the case from the file of Mr. Tadani to his own file, he being the Magistrate most suitable to dispose of the prosecution instituted against the accused. Immediately after the transfer to the file of the subdivisional officer the accused in the exercise of their statutory right applied for a *de novo* or fresh trial: which application was granted by the subdivisional officer.

The subdivisional officer proceeded *de novo* to have the evidence recorded afresh; disregarding all the evidence which had been originally taken and recorded by Mr. Tadani during the period he acted as Magistrate in the trial of the prosecution case against the accused. The subdivisional officer proceeded in the usual way and recorded the evidence on behalf of the prosecution. On 15th January 1919 Mr. Tadani was retransferred back to the district of Monghyr; whereupon the subdivisional officer retransferred the trial of this prosecution to the file of Mr. Tadani, remarking that it would economise time if he would take up the case from where he, Mr. Tadani, had left it. The subdivisional officer

had not proceeded in the course of his investigation as far as Mr. Tadani had at the time that the case was originally transferred to the file of the subdivisional officer in October. The wording of the subdivisional officer's order is as follows:

"This will economise time, since he, Mr. Tadani will take up the hearing at the point where he had left it."

Now it is contended before me that that order of the subdivisional officer, dated 15th January 1919 was an improper and illegal order made without jurisdiction and consequently that the order of conviction by Mr. Tadani was illegal and void in law, and that the accused have been gravely prejudiced in this trial by reason of the illegal order of transfer made by the subdivisional officer and that no appeal properly lay therefrom; and in addition it is contended that the judgment of the learned Sessions Judge of Monghyr in this case was a judgment not in accordance with law, and that therefore it should be set aside. I may say that the argument on the second point was not seriously pressed by Mr. Pal. He devoted his argument to the first ground of the objection and I cannot say that I was impressed by his observations with reference to the second ground asserted for impeaching the validity of the conviction of the accused.

Mr. Pal's contention is that the law requires, speaking generally that the person who convicts an accused shall be the person who has heard the evidence and seen the witnesses at the trial; and the law, *prima facie*, does not contemplate or permit a change or transfer of Judges during the intervening stages of the trial between the commencement and the end of the prosecution. Sometimes it is inevitable that a transfer may take place of an officer pending a trial, and in such cases S. 350, Criminal P. C., seems to make provision as to the procedure to be adopted in such event. Sub-cl. (b), S. 350 provides that:

"Where a Magistrate is transferred and the evidence is partly recorded by one and partly by the other who acts as successor then it is competent for the successor to convict the accused on the evidence recorded by his predecessor: provided that no prejudice thereby be done to the accused."

I admit that Cl. (b) has no application to the facts of this case. S. 350, Criminal P. C., in my opinion, applies to all cases of transfers as well as to cases in

which one Magistrate succeeds another in succession and discharge of the duties of his office. Cl. (a), S. 350, undoubtedly confers a right upon accused persons where a transfer takes place in the constitution of the Tribunal which commenced to try the case, to have a fresh trial *de novo*. I take it that this means that the succeeding Magistrate must start afresh as if nothing had been done; and all that had been done was completely blotted out and superseded and was no longer any part of the case; otherwise it would be senseless to refer to such right as giving birth to a right of fresh trial *de novo*.

I take Cl. (a), S. 350, Criminal P.C., to mean a new beginning, a new start unfettered and unrestricted by anything that antecedently had taken place. If that is so, then in my opinion the Sub-divisional Officer had no power, jurisdiction or right to transfer the case to Mr. Tadani, directing him to proceed with the trial, at the point where he, Mr. Tadani, originally left off when he had due seisin of the hearing of the prosecution, because all that had taken place before Mr. Tadani had been superseded, and must be deemed to be considered as forming no part of the record in the proceeding then actually pending and being prosecuted against the accused. If the learned Sub-divisional Officer had merely transferred the case to Mr. Tadani to proceed from the point, where he, the Sub-divisional Officer, had left off when he retransferred the case to Mr. Tadani, then I think no objection could be urged against the conviction of the accused by Mr. Tadani acting upon the record of the proceedings in the *de novo* trial initiated before the Sub-divisional Officer. Consequently, in my opinion the order of the learned Sub-divisional Officer, dated 15th January 1919, transferring the case to Mr. Tadani in the manner in which he did was *ultra vires* and without jurisdiction; and that consequently Mr. Tadani had no authority or jurisdiction to act on the record of the proceedings which had been antecedently taken before him. Thus in my opinion the accused have been gravely prejudiced in their trial by reason of the course the proceedings took owing to the invalid order made by the Sub-divisional Officer on 15th January 1919.

There are many cases on this point

argued before me. Two cases are to be found reported as *Sobh Nath Singh v. Emperor* (1) and *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (2) respectively, in which the Courts laid down in most emphatic terms that noncompliance with the provisions of S. 350, Criminal P. C., involves prejudice to an accused person. I do not go so far myself as to say that *per se* noncompliance with the provisions of S. 350 must necessarily involve prejudice to an accused in every case, but I say it may do so under certain circumstances, and if prejudice ensues, the accused is entitled to a new and fair trial. In the particular case before me, I am satisfied that the attempt to revive the proceedings which were dead undoubtedly did prejudice the accused, having regard to the fact that in the second edition of the prosecution case oral evidence was given by the witnesses before Mr. Majid, the Sub-divisional Officer, which was at variance with that originally recorded by Mr. Tadani and that it was impossible for the accused under the circumstances of this case to have used the proceedings recorded before Mr. Tadani in the subsequent case before the Sub-divisional Officer, to impeach the inaccuracy of the subsequent evidence, nor would it have been possible, on retransfer of the case to Mr. Tadani, for the accused to have used the proceedings before the Sub-divisional Officer to challenge the evidence originally recorded before Mr. Tadani. I am satisfied therefore on the entire case that the accused have been materially prejudiced by the course the trial took owing to the defective order of the learned Sub-divisional Officer, and I accordingly set aside the conviction of the accused before Mr. Tadani, dated 14th March 1919, and their conviction on appeal before the Sessions Judge, dated 14th April 1919, and I direct that all the accused be tried *de novo*.

V.S./R.K.

Retrial ordered.

(1) [1908] 12 C. W. N. 138=6 Cr. L. J. 431.
(2) [1908] 12 C. W. N. 140=6 Cr. L. J. 434.

A. I. R. 1919 Patna 581

ATKINSON, AND DAS, JJ.

Kapilman Misser—Appellant.

v.

Kokilman Misser and others—Respondents.

Appeal No. 102 of 1917, Decided on 19th March 1918, from original decree of Sub-Judge, Second Court, Muzaffarpore, D/- 10th January 1917.

Civil P. C. (1908), O. 20, R. 12 — Mesne profits—Suit for mesne profits finally dismissed—Subsequent application for assessment of mesne profits—Jurisdiction of Court comes to end.

Where in a suit for partition and possession coupled with a claim for mesne profits, the relief sought by the plaintiff for partition and possession is effectually disposed of and finally determined and an application made by the plaintiff for determination of profits is dismissed for default, the Court ceases to have seisin of the case and no jurisdiction exists in it to entertain any fresh application with regard to the assessment of mesne profits; 15 I. C. 709, *Foll.* [P 583 C 1]

Shorshi Charan Mitra and Amir Hasan—for Appellant.

B. B. Verma and Rajendra Prasad—for Respondents.

Judgment.—This first appeal comes before us from the decision of the learned Subordinate Judge of Muzaffarpur, dated 10th January 1917.

The suit was originally instituted by the plaintiff claiming partition and possession of a four-annas share of the lands specified in the plaint, coupled with a claim for mesne profits in respect thereof from the date of dispossession to the date of the recovery of possession of the same. The learned Judge granted a preliminary, in a sense, but final decree for partition, and directed that the plaintiff was entitled to possession of his share of the lands so partitioned; and against that decree no appeal has been preferred to this Court; and in so far as the relief sought and granted by that decree qua partition and possession, the same has been effectually disposed of and finally determined. By item 5 of the claim and prayer to the plaint, the plaintiff sought compensation for mesne profits from the date of his dispossession until the recovery of possession of the property in suit; and the plaintiff has approximately estimated the value thereof at the sum of Rs. 500. The plaintiff on 15th January 1914 filed a petition under O. 20, R. 12, inviting the Court to exercise its jurisdiction and to direct an

inquiry as to the ascertainment of the mesne profits due to the plaintiff and to pass a decree in respect thereof in favour of the plaintiff; and to this petition was added a schedule, showing exactly how the mesne profits claimed by the plaintiff were calculated and that they amounted to the sum of Rs. 47,647-2-0.

On 19th January the matter came before the learned Subordinate Judge, who directed notice to issue to the opposite party to show cause why a supplementary decree under O. 20, R. 12, Civil P. C., for the amount claimed by the plaintiff by way of mesne profits should not be granted; and the learned Judge directed that the case should be put up for final disposal on 28th February 1914. The learned Subordinate Judge also by this order directed that the necessary process fee be paid by the plaintiff within three days. The Court being unable to dispose of this application on 28th February, an order was made that the matter should be again put up for disposal on 7th March 1914.

Accordingly on 7th March when the application was called on for hearing, it appeared that the plaintiff had failed to pay the necessary process fee directed to be paid by the order of 19th February and accordingly the learned Judge was pleased to make the following order: "Application refused." Now the application that was refused was the application to assess mesne profits; and this disposed of the only remaining part of the original suit that was up to that time undisposed of. On 25th July 1914 the plaintiff filed another petition claiming an assessment of the mesne profits to which he was entitled, exactly similar to the petition which he filed on 15th January 1914 and which had been dismissed on 7th March 1914. The second petition in was in exactly identical terms with the previous petition and the claim for mesne profits was exactly the same. The learned Judge disposed of this application on 15th September 1914, and appointed commissioners to inquire into the plaintiff's claim and assess whatever sum they thought fit and proper on the evidence adduced before them as to the amount of mesne profits to which the plaintiff was entitled. The learned Commissioners who were appointed by the learned Subordinate Judge awarded the plaintiff the sum of Rs. 6,000

as the measure of mesne profits to which the plaintiff was entitled. The matter came before the learned Subordinate Judge on 10th January 1917 for final disposal on the Commissioner's report; and objection was taken before the learned Subordinate Judge, as now before us, to the following effect, that the learned Subordinate Judge had no jurisdiction to entertain the application presented on 25th July 1914, inasmuch as the previous petition or application for the assessment of mesne profits, which was filed on 15th January 1914 had been finally disposed of and dismissed by the lower Court's order of 7th March; and that consequently the disposal of the application for mesne profits on 7th March was a disposal of all that was left remaining undisposed of in the original suit, and that thus no suit was pending in July 1914 in which any subsequent application could be made.

It is conceded that the order of 7th March was an order properly made within the provisions of O. 11, R. 2; and that the learned Judge was justified in dismissing the application for assessment of mesne profits on the grounds he did; and that the only available remedy open to the plaintiff against such order is that provided by O. 9, R. 4, whereunder the plaintiff must elect to adopt one of the two courses, either to abide by the order dismissing the application for assessment of mesne profits and bring a fresh suit, or apply to set aside the order of dismissal, and seek to have the application for an inquiry and assessment of mesne profits restored for hearing. The latter alternative course the plaintiff did not pursue. It is unnecessary for us to determine whether the plaintiff still has a right to pursue his remedy by independent suit to recover the mesne profits which he claims for the years 1317 to 1321 F. S. The learned Subordinate Judge disallowed the objection preferred before him by the defendant-appellant and on the plaintiff's second application for assessment of mesne profits awarded the plaintiff a decree for the sum of Rs. 1,703-3-8. The learned Judge appears to us to have been entirely wrong in the conclusion at which he arrived in point of law. He summarises his conclusion in three lines in the following words:

"In the second place it was not the suit but the application of the plaintiff for the determina-

tion of profits that was dismissed for default; and so I do not think there is any bar to a fresh application of a similar nature."

With great respect to the learned Judge he completely misunderstood the legal position of the parties and the relief which had been claimed in the original suit, which had been in part disposed of, and in respect of which only one item remained to be disposed of, viz., the assessment of mesne profits, and the condition in which the original suit then was. We have been referred to the case of *Upendra Chandra Singh v. Sakhi Chand* (1). The facts of that case appear to us to be identical with the facts of the present case. It is impossible to distinguish the two cases.

In the case reported as *Upendra Chandra Singh v. Sakhi Chand* (1) an order almost similar in terms to that in the present case was made, the difference only being that in the case cited the application for mesne profits was dismissed on the ground that the plaintiff failed to deposit the necessary Commissioner's fee incidental to the holding of the inquiry as to the assessment of mesne profits. The learned Judge who heard the case originally, by reason of the laches of the plaintiff in making the necessary payment, directed that the Commissioner should return the commission "and that the case should be dismissed for default on behalf of the plaintiff." Now the learned Judges on appeal who decided that case, Mookerji, J., and Carnduff, J., reviewed all the authorities with the greatest care and the learned Judges were of opinion that there was no room for controversy on the question raised for their decision, and they held that once such an application for assessment of mesne profits was dismissed all that remained of the original suit was gone, and must be deemed dismissed, and that no fresh or subsequent application for assessment of mesne profits was entertainable. The learned Judges says as follows:

"The result was that on 7th January 1910, the Court recorded an order to the effect that the Commissioner be directed to return the commission, and that the case be dismissed for default on behalf of the plaintiff. Now what was the 'case' thus dismissed? Clearly it was the claim of the plaintiff for recovery of mesne profits from the defendants; as that case was dismissed on 7th January 1910, it was obviously not open to the plaintiff to make a fresh application on 13th January 1910, because there was no pending suit

(1) [1912] 15 I. C. 700.

wherein that application could be deemed to have been made."

The learned Judges then dealt in detail with all the decisions touching and concerning the point arising now for our determination; and there seems to be general uniformity of opinion that once an application such as that in the present case was presented on 15th January 1914 and was dismissed on 7th March 1914 that then the Court ceased to have seisin of the case; and that then no jurisdiction existed in the Court to entertain any fresh application with regard to the assessment of mesne profits. To the law so declared and laid down by the Judges of the Calcutta High Court we beg respectfully to subscribe. A point has been taken before us with regard to the amount of court-fee which should have been paid by the plaintiff in respect of his claim for mesne profits. However having regard to the view we take on the question of law arising for our determination touching the invalidity of the decree of the learned Judge passed on 23rd March 1917, it becomes unnecessary for us to determine the question arising with regard to the court-fee payable. However we desire to add that we are not by any means satisfied that the ruling of the learned Judge with regard to the court-fee payable, which was debated before him, as before us, was correct. Accordingly we allow this appeal and set aside the decree of the learned Subordinate Judge and direct that the plaintiff shall pay to the defendant his costs in the lower Court and the costs of this appeal.

V.S./R.K. *Appeal allowed.*

A. I. R. 1919 Patna 583

ROE AND COUTTS, JJ.

Kamta Prasad Singh and others—Defendants—Appellants.

v.

Nanku Prasad Singh and others—Plaintiff—Respondents.

First Appeal No. 289 of 1915, Decided on 28th May and 7th June 1918.

Transfer of Property Act (4 of 1882), Ss. 55 (5) (b)—Sale of mortgaged property by mortgagor—Money left with purchaser to redeem mortgage—Purchaser cannot be made personally liable to mortgagee.

The purchaser of a mortgaged property had given a verbal undertaking to the mortgagor-vendor to pay off the mortgage and collaterally with that undertaking a clause had been inserted in the sale deed to the effect that the mortgagor vendor had "left in deposit with the pur-

chaser" the sum necessary to redeem the mortgage. The mortgagee sued on the basis of the mortgage and obtained a decree making the purchaser personally liable after the sale of the property.

Held: that as the plaintiff was no party to the sale deed he could not take advantage of the undertaking given by the purchaser to the mortgagor and his suit was therefore liable to be dismissed: 13 I. C. 304 (P. C.), *Foll.*; 7 I. C. 237 (P. C.); *Dist. 20 I. C. 630*; 36 I. C. 792, *not Foll.*; [P 584 C 1]

*Hasan Imam, Kulwant Sahay and Sivanandan Ray—*for Appellants.

*Manuk, G. D. Singh, Jalgobind Pd. Singh, Debendra Nath Das and Achalen-dranath Dass—*for Respondents.

Roe, J.—This appeal arises from a decree of the Subordinate Judge of Patna making the appellants personally liable for any sum that may be found due to the respondents after the sale of certain property in satisfaction of the respondents' mortgage. The appellants are not the mortgagors but had, as purchasers from the mortgagors of the mortgaged properties given a verbal undertaking to the mortgagor to pay off the mortgage and, collaterally with that undertaking, a clause had been inserted in the deeds of sale to the effect that the mortgagor vendors had "left in deposit with the said purchasers" the sum necessary to redeem the property. The case is in no respect distinguishable from that of *Jamna Prasad v. Ram Autar Pande* (1). The learned Subordinate Judge has apparently attempted to distinguish it on the ground that the plaintiff has been prevented by fraud from pursuing the mortgaged property. I can see no rational basis for this suggestion. Not only has the plaintiff here not been prevented by fraud from pursuing the mortgaged property, he has actually pursued it and brought it to sale. The learned Judge's suggestion is hopelessly inconsistent with the decree made that the defendants shall not be held personally liable until the mortgaged property has been successfully pursued. The learned Judge then relies upon the cases of *Khawaja Muhammad Khan v. Husain Begam* (2) and *Debnarain Dutt v. Ram Sadhan Mandal* (3), and at the Bar the case of *Dwarka Nath Ash v. Priyanath Malki* (4) has been quoted. The case of *Khawaja*

(1) [1912] 34 All. 63=13 I. C. 304=39 I. A. 7 (P. C.).

(2) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P. C.).

(3) [1913] 41 Cal. 137=20 I. C. 630.

(4) [1916] 36 I. C. 792.

Muhammad Khan v. Husain Begam (2) is authority only for the proposition that where property is secured for the payment of a grant, the sole beneficiary may enforce the security though not a party to the contract. If indeed, the cases of *Debnarain Dutt v. Ram Sadhan Mandal* (3) and *Dwarka Nath Ash v. Priya Nath Malki* (4) are inconsistent with that of *Jamna Das v. Ram Autar Pande* (1) we could not follow them. The learned Subordinate Judge has stated it as a fact that the plaintiff was no party to the agreement engrossed in Exs. 2 and 3, the deeds of sale and no other finding would have been possible, for it was the defendant's case not only that he had no agreement with the plaintiff Nankhu Persad Singh, but also that Nankhu Persad Singh had no interest in the transaction the mortgage being in fact given on a loan made by a party not on the record, Amar Singh.

The true position is patent on a reference to Ss. 55 (5) (b), T. P. Act:

"The buyer may retain out of the purchase money the amount of any encumbrances on the property existing at the date of the sale and shall pay the amount so retained to the persons entitled thereto."

The clause inserted in the deeds of sale is no more than an admission of the buyer's statutory rights and the oral contract to pay no more than an admission of the buyer's statutory liability. The buyer's liabilities to the seller in this regard have been fully stated by the Judicial Committee in the cases of *Muhammad Siddi Khan v. Muhammad Nasirullah Khan* (5) and *Izzatunnissa Begum v. Pertap Singh* (6) and it is clear from the case of *Jamna Das v. Ram Autar Pande* (1) that in the absence of a direct contract with the encumbrancer the seller has no liability towards him. I would decree this appeal with costs and direct that the suit as against the appellants be dismissed with costs.

Coutts, J.—I agree.

V.S./R.K.

Appeal allowed.

(5) [1899] 21 All. 223=26 I. A. 45=7 Sar. 472 (P. C.).

(6) [1909] 31 All. 583=3 I. C. 793=36 I. A. 203 (P. C.).

A. I. R. 1919 Patna 584

MULLICK AND THORNHILL, JJ.

Madan Guru and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Death Reference No. 4 of 1918 and Criminal Appeals Nos. 63 and 65 of 1918, Decided on 25th April 1918, reference made by Sess. Judge, Sambalpur.

(a) Criminal P. C. (5 of 1898), S. 164—Statement by accused before trial, is not only admissible but has great evidentiary value.

There is nothing in S. 164 or any other sections of the Criminal Procedure Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement, if proved to be voluntary, is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt: 2 C. W. N. 702; 9 Mad. 224; Diss. from; A. I. R. 1915 Cal. 256, Cited. [P 590 C 1]

(b) Evidence Act (1 of 1872), Ss. 9, 11 and 21—Previous statement of accused if relevant are admissible—Before whom made is immaterial.

Sections 9 and 11, read with S. 21 amply justify a Court in admitting into evidence all previous statements made by an accused which have a bearing upon the question of his guilt and whether the previous statement is made to a police officer, to a judicial officer or to a third party is immaterial, if the statement is relevant to the fact in issue, namely, the accused's guilt; 2 C. W. N. 702, Expl. [P 590 C 1]

(c) Evidence Act (1 of 1872), S. 133—Evidence of accomplice though sufficient for conviction must be corroborated before acceptance in material particulars—Evidence Act, S. 114, Illus. (b).

Under S. 133 the evidence of an accomplice by itself would be sufficient for the purpose of a conviction; but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise that presumption is an error of law; 1 Cr. App. R. 215, Noticed. [P 590 C 2, P 591 C 1]

Gour Chandra Pal and Gajendra Prasad Das—for Appellants.

Sultan Ahmad—for the Crown.

Mullick, J.—The appellant, Madan Guru, has been convicted under S. 302, I. P. C., of murder by causing the death of a young woman named Anuchaya on the night of 8th December 1917, and has been sentenced to death. The case now comes before us on a reference made by the Sessions Judge of Sambalpur for confirmation of the sentence. The appellant Basudeo, who has preferred Appeal No. 65 of 1918, was a servant of Madan Guru and has been convicted also

of the same offence and sentenced to transportation for life. It appears that three other persons, namely Ganda Gour (also a servant of Madan Guru) a man named Sankri Keot and his wife Kheri Keotni were also placed upon their trial before the committing Magistrate jointly with the two appellants before us. Of these the two last named, Sankri and his wife, were discharged by the Magistrate on the ground that there was no sufficient evidence against them, and in the Court of Session they were the principal witnesses for the Crown. As to Ganda he was committed for trial to the Court of Session together with the two appellants but he has been acquitted by the learned Sessions Judge agreeing with the two assessors. With regard to the two appellants, one of the assessors was for acquitting both; while the other, although not very clear in the opening part of his opinion, finally came to the conclusion that the evidence was sufficient. The learned Sessions Judge, agreeing with the last named assessor and disagreeing with the first named, has convicted the two appellants and has sentenced them as stated above.

Now, before the events of the night of the alleged murder are recited, it is necessary to note that the deceased Anuchaya was living in the village of Lapanga in the same homestead with her father Babuna, her brother Sitaram, and her brother's wife Sita Kultani. She occupied a hut of her own, separate from that of the others. Some three years previously she was divorced by her husband who is now living in another house in the same village. Although ostensibly supporting herself by the sale of dried fish, she had been since then Madan's mistress. Madan was in the habit of visiting her and sometimes spending the whole night in her house; while she also was in the habit of going over to Madan's house in the company of Basudeo.

Now it is alleged, and in my opinion proved, that some time in the afternoon of 8th December last, the accused Basudeo came to the house of Babuna and asked the deceased to go with him to Madan's house. The evidence of Sita Kultani, the sister-in-law of the deceased, leaves no room for doubt that Madan had been in the habit of sending for the deceased, that he had frequently made presents to her and that some of the deceased's ornaments were at that time in

Madan's custody. Sita states that she saw Basudeo departing with the deceased on the afternoon of that Saturday. She is corroborated by Babuna and by a very disinterested witness named Nidhi Satpati, a postal peon, who happened to go to the house of the deceased on that day for the purpose of buying vegetables from the deceased. This postman deposes that the deceased appeared to be in a hurry and said that she could not attend to him because a man had come to take her to Gurupali, which is the village in which Madan resides.

The evidence of Sita Kultani has been very strongly attacked by the learned vakil, who appears on behalf of the appellant Madan before us and it has been repeatedly asserted that she is a maliciously false witness, who has been tutored by the police for the purpose of implicating Madan in this very serious charge. We agree with the learned Sessions Judge that this witness, in spite of contradictions here and there, has on the whole given a straightforward story and that she saw the deceased depart with Basudeo on the afternoon of Saturday, 8th December. With regard to Nidhi Satpathi no reason has been assigned for disbelieving him and the evidence shows that he came forward so early as 11th December to tell the Sub-Inspector who was investigating into the case that he had seen Basudeo departing with the deceased on the previous Saturday. Then there is the evidence of a boy named Khedu Gond, who tells us that he saw the deceased with Basudeo on the road between Lapanga and Gurupali. A similar statement is made by a witness named Chabila Keot, and in my opinion there can be no doubt that he and Khedu are actuated by no malice towards the appellants and that, though not examined by the police till 16th December, they have spoken the truth at the trial.

The scene next shifts to the village of Gurupali, three miles from the home of the deceased. If we do not believe Sankri Keot and his wife Kheri Keotni, there is no direct evidence as to where the deceased was during the night of 8th. If on the other hand we believe them then their evidence shows that she was at the house of Madan on the night of 8th December, that she was thence accompanied by Madan, Basudeo, Ganda, San-

kri and Kheri as far as a streamlet named Gangajal Jore, which is about half-way between the house of Madan and her own house, and that there she was killed by the two appellants with a tangi, which is an instrument resembling an axe. Apparently the absence of the deceased did not in any material degree excite the suspicion or the anxieties of her relatives and no action appears to have been taken on 9th December. But on Monday, 10th December, Babuna discovered a number of bones and some ornaments and clothing belonging to his daughter in the bed of Gangajal Jore and he then appeared at 2 p. m. before the Sub-Inspector, Bhakta Hari, who was the officer in charge of Katarbaga police station and happened, it is alleged, to be staying in the village Gurupali for the purpose of doing his rounds. Babuna lodged an information stating that he had been early in the morning to Basudeo and that Basudeo had told him to inquire of Madan what had become of the deceased, that he had asked Madan also and that Madan had replied that the deceased had probably gone home by a roundabout way.

Although no direct charge of complicity in the death of the deceased was laid in this information either against Basudeo or Madan, its general trend is to hint that they had a hand in the disappearance of the girl. The Sub-Inspector thereupon arrived at the place where the remains were lying and commenced his investigation. The Sub-Inspector, who was at the time when the information was recorded staying in the house of Madan and who has been charged freely with, improperly favouring him, does not appear to have taken any action against Madan or Basudeo on 10th or 11th. It appears however that on 12th, at about midday, Basudeo and Ganda, who were not under any police restraint, made a very important statement to the Sub-Inspector. We have no details of that statement on the record. As it was a statement which was in no sense a confession I think the learned Sessions Judge ought to have got that statement proved by the Sub-Inspector and made it a part of the evidence in the case. The omission to do so was, in our opinion, serious. But this much we do know that Basudeo and Ganda implicated Sankri and his wife and that upon the strength

of their statement these two persons were arrested at 6.30 p. m. and dispatched to Sambalpur, the headquarters of the District, the following morning, that they reached Sambalpur that day, and that on 14th December their statements, purporting to be statements under S. 164, Criminal P. C., were recorded by Deputy Magistrate Maulvi Wasiq Ali. Meanwhile, the Sub-Inspector (it is not known whether he was still staying at the house of Madan or not), was carrying on his inquiry and on the 14th December, in consequence of further statements made about 2 p. m. by Basudeo and Ganda, he arrested Madan, Basudeo and Ganda on the charge of murder. It has been suggested by the learned Sessions Judge that the Sub-Inspector's action was quickened by the knowledge that the Deputy Superintendent of Police being dissatisfied with the progress made in the investigation, was himself proceeding to Lapanga. As a matter of fact, the Deputy Superintendent did arrive some time on the night of the 14th December and brought with him one or more Sub-Inspectors to assist in the investigation. On the 15th December Sankri and his wife were brought back in custody from Sambalpur to the place of occurrence where they were confronted with Madan, Basudeo and Ganda who were still in police custody; and in consequence of certain statements made by Sankri a purse containing Rs. 7-2-6 was recovered by the police from the young son of Sankri.

The matter of this purse has an important bearing in the case because it is alleged that on the 12th December, immediately after her arrest, the wife of Sankri gave up the purse to the Sub-Inspector, Bakhta Hari, stating that the accused Madan had given her Rs. 8 as hush money immediately after the murder of Anuchaya and that she had spent annas 13 pies 6 out of the Rs. 8 and that the balance was in that purse. I will refer later to the Sub-Inspector's conduct in reference to this matter, but at this stage it is only necessary to say that it is the case of the prosecution that the Sub-Inspector has either negligently or intentionally omitted to record in his diary this very important statement by Kheri. On the 15th, 16th and 17th some witnesses were examined and on the last-mentioned date the five accused, namely

Madan, his two servants (Basudeo and Ganda) Sankri and his wife were dispatched to Sambalpur. On arrival there Basudeo and Ganda both made statements before the Deputy Magistrate, Maulvi Wasiq Ali, which were recorded under S. 164, Criminal P. C. Madan refused to make any statement, with regard to his connexion with the alleged crime.

At this stage it will be convenient to consider the submission which has been so forcibly made before us by the learned vakil appearing on behalf of the appellant Madan, that it has not been established that any murder took place. Now the evidence upon this point is this: The medical evidence in the case shows that the skull and other bones found in the Gangajal Jore by the police are the remains of a human being the sex whereof it is impossible to determine. The ornaments found strewn about the place have been identified as those which Anuchaya had been wearing. They are ordinary ornaments, such as are in common use and do not bear any special marks of identification, but nevertheless the witness Sita being a person living in the same house with the deceased would be in a position to identify them. The evidence given by her establishes that these are ornaments similar to those which Anuchaya was wearing when she left the house in the afternoon of the 8th December. Then a silk sari and a wrapper was also found at the place. Evidence has been given by two dhobis, a man and a woman, which shows that this sari was that of the deceased and that the wrapper was one which was used by the deceased and by various members of the deceased's family. There is also the evidence of a tailor who deposed that he once cut this wrapper and sewed up the ends. It is contended that the whole of this evidence as to the identification of the sari and the wrapper is false. It is true that the sari and the wrapper bore no identification marks, but it cannot be said that the persons who had washed them were not in a position to identify them nor that the tailor who had cut the wrapper was incapable of identifying it when called upon to do so. The medical evidence also shows that human blood was found upon both these pieces of cloth. The case for the prosecution is that the body of the deceased was left in the bed of the stream from the night of the 8th

till the morning of the 10th December and that wild birds and animals having preyed upon the remains, there was nothing left from which the features of the deceased could be identified. Having regard to the conditions which prevail in this country it is impossible to reject this theory. There is further direct evidence to show that on 9th December the body of the deceased was found in a state capable of identification by at least three witnesses. The first of these is the boy Khedu to whom reference has already been made. He states that he saw the body of Anuchaya lying at the place with the throat cut and that he fetched his master Ainthia and showed him the corpse. There is also the witness Sankri Padhan, who states that while going to market on the 9th in the afternoon he saw the body being eaten by vultures. It is remarkable that none of these witnesses who profess to have recognized Anuchaya gave any information that day to the members of her family.

It appears that Khedu was examined by the police on the 16; Ainthia was also examined on the same date while Sankri was examined on the 17th and the only explanation offered by these witnesses for not giving immediate information was that they were overcome with fear that they might be implicated in the case. Having regard to the conditions prevailing in the tract from which this case comes and to the general ignorance of the class of persons to which these witnesses belong, the explanation does not seem to me to be at all an improbable one. With reference to the witness Khedu there is a further fact which requires to be considered. He states that he met Sitaram, the brother of the deceased, on the morning of Monday the 10th, and that he told Sitaram that he had seen the body on the previous day. Now Sitaram was examined by the police on the 11th and he made no mention of the fact that Khedu had told him that he had seen the body on the 9th. It was not till 15th December that Sitaram told the police that Khedu had seen the body on the 9th. This is undoubtedly a point against the prosecution but having regard to the weight of evidence to the contrary, I think it is established that Khedu and the other two witnesses are speaking the truth.

In these circumstances, the only conclusion which can be drawn from the facts is that the deceased met her death by violence. The next question is who caused her death? Suspicion naturally fell upon Basudeo. When first questioned by Babuna he declined to give any information of the girl's whereabouts. It is suggested that the deceased might have gone on her business, which was that of selling fish and met her death at the hands of some person or persons unknown. In this connexion our attention has been drawn to an inconsistency between the information lodged by Babuna and the evidence given by him at the trial. In the information he stated that the deceased left with a basket of fish, whereas at the trial he has made rigorous attempts to deny that he made any such statement at all. Now the reason for this denial is quite apparent. He is afraid of making any admission which will favour the theory that the murder was committed by some unknown person. Whether the basket was a mere pretext or whether she did intend to do some selling that day there is no evidence to show, but that she did go with Basudeo is in my opinion conclusively established.

The onus therefore lies heavily on Basudeo to account for her subsequent movements. His denial that he went to the girl's house at all raises an inference of guilt though not by any means a conclusive one; but the importance of her being last seen in his company is that it furnishes corroboration of the evidence of the two accomplices Sankri and Kheri. But before I proceed to deal with their evidence it is necessary to refer to one part of the case about which there is considerable controversy. Both of them state that they went on 8th December to Madan's house at his request for the purpose of discovering ways and means of procuring an abortion upon the deceased. The case for the prosecution is that the deceased was three months' pregnant and that the accused, Madan was responsible for her condition. On behalf of the defence there is a complete denial of the pregnancy although the intimacy is admitted. It is argued that the whole story about Sankri and his wife having gone to the house of Madan on that night is a concoction from beginning to end. Now the two witnesses who give direct evidence as to the condition of pregnancy are

Sita, the sister-in law of the deceased, and a woman named Tara. With regard to Tara the learned Sessions Judge, we think rightly has preferred to class her as a somewhat doubtful witness. She states that she was in the habit of accompanying the deceased to the house of Madan and that one night, while the deceased and Madan were sleeping in one of the apartments while she (the witness) was in another apartment, she overheard conversation between Madan and the deceased in which the deceased threatened Madan with exposure on the day of his daughter's wedding. We think it is doubtful whether this witness could have overheard the whole conversation under the conditions which she relates, and as the learned Sessions Judge has, after observing her demeanour in the witness-box, declined to accept her as a witness of truth, we think we must also form the same estimate of her testimony. But with regard to Sita, there can be no doubt that she was in a position to notice the symptoms which she describes. Her evidence therefore also corroborates the story told by the accomplices as to the object of their visit to the house of Madan on the night of the 8th. It has been pointed out to us that neither in her statement as recorded by the police nor in her statement before the committing Magistrate was any mention made by her of the symptoms which she now describes. The omission on the part of the Sub-Inspector may be due to neglect or, as is suggested by the prosecution, to a desire to shield Madan and from the circumstances that he made the same kind of omission in regard to Sankri's wife raises strong suspicions against his honesty. As to the statement before the committing Magistrate which is very brief it is not known whether the witness was ever questioned upon this point. If she had been, and if she had then denied the fact of pregnancy, there may have been good ground for suspecting the evidence of the accomplices upon this question, but in the absence of any direct evidence to show that the statement made by Sita in the Sessions Court is false, I think her account of the symptoms observed in the deceased must be accepted as correct.

There is one other point in this connexion which has been brought to our notice today by the learned vakil for the

appellant, Madan: the learned vakil points out that in the *surat hal* report drawn up on the 10th December there is mention of a kaupina cloth which has been translated in the report as "under-cloth" and which is said to have been found near the remains in the Gangajal Jore. It is suggested that a kaupina cloth is generally worn by women during the period of menstruation and that the finding of such a cloth completely demolishes the theory as to the deceased's condition. Now, whether a kaupina is a cloth such as is suggested by the learned vakil for the appellant or not has not been established by any evidence. My own impression, on reading the report, was that it was a kind of under-skirt worn usually by women under their outer sari; but even if it be such a cloth as is now suggested it is in my opinion not inconsistent with the theory of pregnancy; for it is a well-known fact that even during that condition menstruation some times continues for several months.

The accomplices having been corroborated so far, let us proceed to test the rest of their evidence. It has been contended by the learned vakil who appears for the appellant, Madan, that the statements of Sankri and his wife before Maulvi Wasiq Ali on 14th December 1917 are wholly inadmissible in evidence. The learned Sessions Judge has made no reference to these statements and I think that he was wrong in omitting to do so. If they had previously made any inconsistent statements then surely the accused were entitled to the benefit of the doubt arising from such inconsistencies. It appears that the learned Deputy Magistrate caused the exact words of Sankri and his wife to be recorded in Uriya by a clerk acquainted with that language while he himself recorded a note in English. We have before us a translation of the vernacular statement and we find that at that early stage Sankri stated before the Deputy Magistrate that he and his wife had been taken to the house of Madan by Basudeo and that he was asked by Madan's mother to procure an abortion, that he replied that he could not perform the puja because he was not in a condition to do so on that day and that he would perform it 4 or 5 days later. It is necessary to note here that according to the evidence Sankri is believed to be an

exerciser of evil spirits and that he and his wife are the priest and priestess of the temple of Kali close to the scene of occurrence. The statement proceeds to recite that at Madan's request they accompanied Madan, Basudeo, Ganda and Anuchaya, who was brought out of a hut called the Chanri house as far as the Gangajal Jore, that when they had reached the bank of the streamlet, Madan and Anuchaya went on ahead while the other four remained behind, that shortly afterwards Madan called out to Ganda and Basudeo, that Ganda and Basudeo then went forward; that Basudeo handed a tangi to Madan, that Madan struck Anuchaya with the tangi, that thereupon Basudeo also struck her and that in answer to Anuchaya's entreaties for mercy, Madan replied that she would not escape death. Kheri's statement though a much shorter one, is to the same effect. There is however one curious point in it which required to be noticed. She asserts that Anuchaya cried out and begged for mercy exclaiming that she would not stay in Madan's house. In explanation of this it is suggested by the prosecution that Anuchaya had threatened to stay in Madan's house against his will in order to shame him and to force him to make some provision for her.

The learned vakil for the appellant, relying upon the case of *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1) contends that both these statements recorded by Maulvi Wasiq Ali are without jurisdiction and are not, therefore admissible either to corroborate or contradict Sankri and his wife. Now it is true that one of the learned Judges in the case just cited, namely, Banerjee, J., clearly expressed the opinion that a Magistrate acting under S. 164, Criminal P. C., has only jurisdiction to record the statements of witnesses and the confessions of accused persons and that if an accused person makes a statement which falls short of a confession there is no jurisdiction to record that statement and if recorded it is inadmissible as evidence at any subsequent stage of the case. The learned Judge is of opinion that the sections of the Evidence Act are controlled by Ss. 164, 342 and 364, Criminal P. C., and he relies upon a decision of the Madras High Court in *Queen-Empress v.*

(1) [1898] 2 C. W. N. 702.

Viran (2). The other learned Judge who formed the Bench did not, however go so far, but on the facts of that particular case preferred to hold that the statement was inadmissible on the ground that it had been shown that it was made voluntarily. With the greatest respect, I venture to differ from the view of the former learned Judge. In my opinion there is nothing in S. 164 or any other sections of the Criminal Procedure Code which forbids a Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement, if proved to be voluntary, is not only admissible but is of the greatest value as a fact relevant to the probability or improbability of his guilt. It has been held in *Emperor v. Kangal Mali* (3) that statements made before the police at any stage before the examination of the accused in Court for the purpose of explaining the evidence recorded against him are admissible for the purpose of adjudicating upon his guilt, and that being so, I entirely fail to see why statements to a Magistrate under conditions which are much more reliable than those under which statements before the police are recorded should not also be admissible. Ss. 9 and 11, read with S. 21, Evidence Act, in my opinion amply justify a Court in admitting into evidence all previous statements made by the accused which have a bearing upon the question of his guilt and whether the previous statement is made to a police officer to a judicial officer or to a third party is immaterial if the statement is relevant to the fact in issue, namely, the accused's guilt.

It is true that the rule of their Lordships' decision in *Queen-Empress v. Bhairab Chunder Chuckerbutty* (1) has been followed in other cases in regard to statements made in the course of what are known as verification proceedings in the presence of the police but whatever might be said with regard to the value of those statements, I do not think that these cases lay down any general proposition of law, that it is not competent to the prosecution to prove as against an accused statements made by him at a stage previous to his examination in Court. Holding therefore that

the statements made by the two accomplices in this case before the Deputy Magistrate under S. 164 are admissible, the question is whether or not they corroborate the statements made in the Court of Session. There does not seem to be any material discrepancy and they are in my opinion acceptable as corroborating, under S. 157, Evidence Act, their testimony in the Sessions Court. Then as to the statements made by these witnesses on 19th December before the Committing Magistrate, there is no material variation except as to the respective parts played by Madan, Basudeo and Ganda in inflicting the injuries upon the deceased.

In the view I take of the complicity of Madan, his two servants and Sankri and his wife in the murder the actual part played by each in the attack is a matter of comparatively minor significance but if anything is to be gathered from the variations as to the part played by each in the attack, it is that there was an inclination to protect Madan and Ganda at the latter stages of the case and to ascribe the fatal blow to Basudeo. Holding that those variations are of minor importance I am satisfied that the evidence of Sankri and his wife has been materially corroborated. Now the learned counsel who appears for the Crown and who has argued the case with great fairness has attempted to suggest that Sankri and Kheri were not accomplices in the legal sense of the word, and that though they may have been present it has not been shown that they were privy to the conspiracy to murder. It is impossible, having regard to the ordinary course of human affairs, to accept the suggestion that although they arrived in the middle of the night at the house of Madan, and although they were asked to engage in a nefarious operation upon the deceased, and although they consented to go with the deceased and Madan and his two servants to the bed of the stream, they had no intention of joining in the attack which put an end to her life. In my opinion they were fully cognizant of the purpose for which they were taking the deceased, and having regard to all the circumstances I have no doubt that they were party to a conspiracy for the purpose of causing the death of the deceased. No doubt, under S. 133, Evidence Act, their evidence by itself would be suffi-

(2) [1886] 9 Mad. 224.

(3) A. I. R. 1915 Cal. 256=26 I. C. 161=41 Cal. 601.

cient for the purpose of a conviction but it is a rule of practice founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars. Failure to raise this presumption is an error of law but the degree of weight to be attached to the presumption is a matter to be judged on the facts of each case and it is for the Court to say upon the evidence adduced before it whether that presumption has been adequately rebutted. The learned counsel for the prosecution has drawn our notice to the case of *Phillip Jacobs* (4). In that case the accused were charged with dishonestly retaining stolen property and the only corroboration was a denial on his part of his intimacy with the actual burglar.

The Court held that the denial itself was sufficient corroboration. Now, in this case what is the position? I have already said that it has been established that Basudeo went to the house of the deceased and brought her away saying that she was required at Gurupali. Basudeo has not explained where he took the deceased. It is established that Basudeo is the servant of Madan and that he sleeps in the house of Madan at night, that there is no reason for suspecting him of any intimacy with the deceased, that Madan on the other hand had been the paramour of the deceased for three years, that he was in the habit of sending Basudeo to fetch her, and that Basudeo had on previous occasions fetched her. It is not a reasonable inference to draw in these circumstances that on this day too she was fetched by Basudeo not for his own purposes but for Madan's purposes? Then we have the events which took place in the early part of the evening. The evidence of Sarthak Gond shows that he, early in the evening, went with Ganda to fetch Sankri to Madan's house and that Sankri at first refused to come. Then there is the evidence of Palan Kulta, another servant and the boy Lochan, also a servant of Madan who was sleeping in the house that night and who states that Sarthak came to the room in which Basudeo was sleeping and asked Basudeo to go to his master. There is also the evidence of these witnesses to the effect that later on they saw Madan

leave the house with Basudeo and Ganda and that Basudeo did not return till a very late hour of night.

I see no reason for disbelieving these witnesses. The learned Sessions Judge and one of the assessors have seen these witnesses and believed them and I see no reason for doubting the correctness of their finding. Finally there is the evidence of Sankri's little boy Kangalu Keot who states that Madan, Basudeo and Ganda came and took his father and mother with them that night. It has been suggested that it is very unlikely that these two accomplices would have left the young boy in the house alone. Then it is suggested that it is extremely unlikely that if Madan was desirous of procuring an abortion upon the deceased his mother who comes of a respectable family would have interviewed Sankri and his wife and discussed the matter with them. In my opinion that direct evidence in this case is such that it is impossible to reject it on the ground of its improbability. Therefore in my opinion, taking the evidence as a whole, there is material corroboration of the statements of the accomplices and the guilt of the accused, Madan, is established beyond doubt. For the same reason the guilt of Basudeo is established with equal certainty.

One other matter remains to be considered and that is the question of motive. It is clear that Basudeo had no direct motive in killing the deceased. He joined the conspiracy merely at the instigation of his master. With regard to Madan it has been contended that he was fond of the deceased who was a young woman of 24 or 25 years of age, that he is a comparatively wealthy man, that his father had done creditable service under Government and was a Rai Sahib and that a man of his position could have afforded to keep Anuchaya as his concubine. It is impossible in every case to find the motive for the crime, but it has been suggested that Madan may have considered it more convenient to get rid of Anuchaya as she was likely to become troublesome and we can only say that such a theory is not inconsistent with the evidence which has been laid before us. There is also a suggestion that the attack and the killing took the form of a sacrifice to the goddess Kali. There is no evidence to support this suggestion except a statement made by

(4) 1 Cr. App. R. 215.

Basudeo, but the presence of the priest and priestess of the temple and the undoubted visit of Madan to the temple immediately after the visit for purpose of invoking the assistance of the goddess does suggest that there may have been a religious element in the crime. The priest and the priestess had no particular motive in joining the conspiracy and this part of the case must I fear be left in obscurity. There is however one feature in the statement made by them which is as curious and unintelligible as it is extraordinary. They state that before the attack the remaining members of the party hung back while Madan and the deceased went forward in the direction of some bushes and Madan had sexual intercourse with the deceased. It is not a late invention. We find it in Sankri's statement on 14th December before the Deputy Magistrate and since that date all subsequent statements, whether made by Sankri or Kheri, or Basudeo or Ganda make mention of this fact. What the relevancy of this act is to the crime I am unable to say.

Finally, there is one other point which requires to be noticed, namely, the finding of the purse containing Rs. 7-2-6. The Sub-Inspector did not record the fact that Sankri's wife had stated on 12th December that the money had been given to her by Madan. The evidence of Jubraj and Sidheswar Tripathy establishes that this statement was in fact made by Kheri and Kheri's deposition in Court is that this money represents the balance of the Rs. 8 which were given to her as hush money. Madan had declined to make any statement as to this. A written statement was filed on this behalf which is quite valueless and ought not to have been received and in which he gives no explanation of the various circumstances established against him. Although it was not obligatory upon him to make a statement, he ought, if innocent, to have been in a position to explain these

circumstances. In these circumstances, the conviction for murder with regard to him as also with regard to Basudeo must be upheld. As regards the question of sentence, where five persons join together in a conspiracy to kill another the actual part taken by each in the furtherance of the common object of that conspiracy is immaterial, but, nevertheless, I think that there are circumstances in this case which make it unnecessary that we should confirm the sentence of death passed upon Madan. It is difficult to say from whose brain came the instigation to murder. It may have been the priest and the priestess who suggested it as it is in evidence that it was the 9th day of the moon on which day sacrifices are made to the goddess Kali; or it may be, though this is only conjecture, that the mother of the accused, Madan, was responsible; or it may be that the accused Madan himself was responsible; but in view of this uncertainty I think that it would be more prudent to set aside the sentence of death passed upon Madan and substitute therefore the sentence of transportation for life.

It is accordingly ordered that the conviction of the appellant Madan be, as is hereby, confirmed. The sentence death passed upon him is set aside and lieu thereof he is sentenced to transportation for life. The conviction and the sentence of transportation for life passed upon the appellant Basudeo are confirmed and his appeal is dismissed. In conclusion we have to express our appreciation of the fair and able manner which this case has been argued before both by the learned vakil for the appellant and by the learned counsel for the Crown and of the assistance they have rendered to us in the discharge of our difficult task.

Thornhill, J.—I concur.

V.S./R.K.

Appeal dismissed.

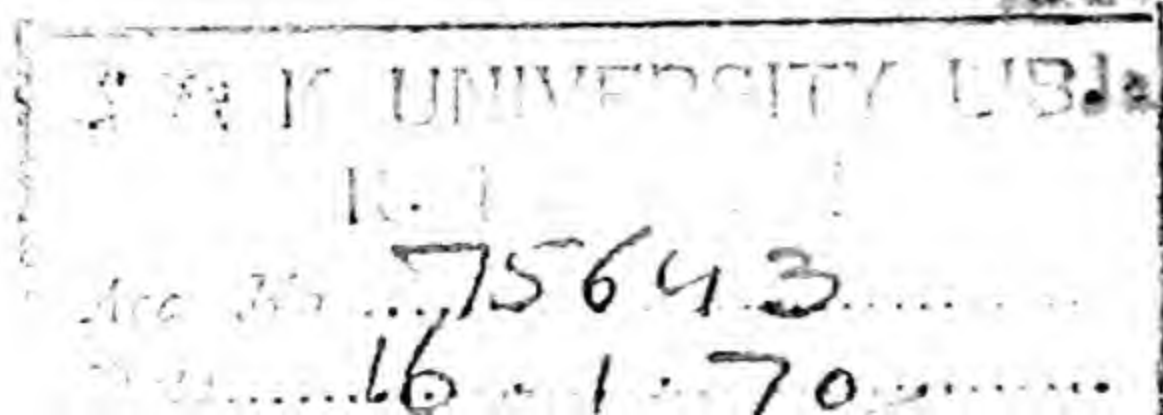
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G. N. Das

Advocate High Court

Jammu & Kashmir

Srinagar.



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